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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Petitioner,

vs.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATE'S DEPARTMENT OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State by its participation as a state licensing agency in the federal program created by the Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.* ("the Act"), waives its Eleventh Amendment and sovereign immunity against monetary damages;

2. Whether the Act imposes a duty upon a State to act as a surrogate agent and protector of vendors licensed to operate facilities on federal property against wrongful acts of the federal agencies and to pursue the vendors' grievances against federal agencies through arbitration and litigation;

3. If such a duty is created by the Act, whether the Act empowers an arbitration panel to award compensatory damages to a vendor against a State for breach of such duty.

PARTIES TO THE PROCEEDING

All parties in this Court appear in the caption of the case.

The parties have no parent companies or non-wholly owned subsidiaries that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Brenda Premo, Director of the California Department of Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 119 F.3d 764 (9th Cir. 1997). The opinion is reproduced in Appendix "A" to this Petition. The order of the United States District Court for the Central District of California (Davies, D.J.) is unpublished and is reproduced in Appendix "B" to this Petition. The liability decision of the arbitration panel in this matter is reproduced in Appendix "C" to this Petition while the damages decision is reproduced in Appendix "D."

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit from which review is sought was entered on July 11, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter involves the following constitutional and statutory provisions.

The Eleventh Amendment to the U.S. Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

> of another State, or by Citizens or Subjects of any Foreign State."

The Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.* ("the Act"), provides employment opportunities for blind persons by granting a priority to blind persons to operate vending facilities on federal property. 20 U.S.C. §§107(a), 107(b). The U.S. Secretary of Education has overall responsibility for administration of the program at the federal level. 20 U.S.C. §§ 107(b), 107a(a). The program is administered through state agencies, designated as state licensing agencies, which negotiate with federal agencies to obtain locations for vending facilities upon federal property within the state, select and license qualified blind vendors, and provide specified services to the vendors. 20 U.S.C. §§ 107(b), 107a, 107b, 107b-1.

The Act requires that income from vending machines located upon federal property upon which a blind vendor is operating a vending facility on such property "shall accrue" to such blind vendor. 20 U.S.C. § 107d-3(b). The federal agencies upon whose property the vending machines are located are assigned responsibility for the collection of such vending machine income. 20 U.S.C. § 107d-3(b)(2).

To be designated the state licensing agency under the Act, a State must agree:

> ". . . to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title. "

20 U.S.C. § 107b(6).

In providing for arbitration of disputes between the vendor and the State, the Act states in relevant part that:

> "Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency . . . . If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. § 107d-1(a).

In providing for arbitration of complaints of the State against the federal agency, the Act states in relevant part:

> "Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder . . . such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. § 107d-1(b).

The Act also provides that if the panel convened to hear the complaint of the State finds that the acts or practices of the federal agency are in violation of the Act, "the head of any such department, agency or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." 20 U.S.C. § 107d-2(b)(2)

The arbitration panel's decision under both 20 U.S.C. § 107d-1(a) and 20 U.S.C. § 107d-1(b) is a "final agency action" which is subject to appeal and review pursuant to the Administrative Procedures Act (5 U.S.C. § 701 *et seq.*). 20 U.S.C. § 107d-2(a).

Accordingly, in reviewing the decision of the arbitration panel, the district court is required to "decide all relevant questions of law and interpret statutory and constitutional provisions," and to set aside the arbitration award if it is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority or limitations; unsupported by substantial evidence; or unwarranted by the facts. 5 U.S.C. § 706.

STATEMENT OF THE CASE

This litigation arises from an arbitration held pursuant to the Act, to hear complaints of vendor Jeana Martin ("Martin") regarding actions taken by the California Department of Rehabilitation (the "Department") in its capacity as a state licensing agency.

A. The Arbitration

Martin alleged that the Department failed in its duty, allegedly imposed by the Act, to pursue her complaints of allegedly improper actions by the federal agency on whose property Martin's vending facility was located, the U.S. Postal

Service. Specifically, Martin complained that the Postal Service had failed to remit to her income from other vending machines located in the postal facility which were operated by a private vendor, and that the contract between the Postal Service and the private vendor called for prices so low that Martin was unable to compete with them. (Appendix C, pp. 10-14) Martin further alleged that the Department's failure to pursue her complaints against the Postal Service resulted in damages to her in the form of lost income and ultimately her loss of the facility and termination by the Department of her license. (Appendix C, p. 17)

The arbitration panel found that the Department had violated the "letter and spirit" of the Act. (Appendix C, p. 18) The violations found by the panel included the failure of the Department to "protect" the priority accorded to blind vendors under the Act, the failure to "insist upon" remittance to the Department of all vending machine income to which blind vendors were entitled, the failure to "stand firm" against the Postal Service contract for the operation of vending machines by a private vendor, and the Department's termination of Martin's license "without sufficient foundation." (Appendix C, p. 24) These actions were described as an "abrogation" of the Department's "duty" to act as "surrogate agent" and "protector" of the vendor against the "wrongs of the federal agency." (Appendix C, p. 21)

The only statutory language cited by the panel in support of its findings that the Department had affirmative duties to "protect," "insist" or "stand firm" in its dealings with the Postal Service were the provisions of 20 U.S.C. § 107d-3(b) requiring income from vending machines on federal property to accrue to the vendor. (Appendix C, pp. 19-20) The panel ignored that the obligation to collect such income is imposed upon the federal agency, the Postal Service in this case, and not upon the Department. Based upon its unsupported interpretation of the role of the state licensing agency as "protector" of the vendor, the panel imposed upon the Department a non-discretionary

obligation to pursue "through arbitration and litigation, if necessary" whatever grievances a vendor may assert against a federal agency. (Appendix C, p. 21)

The panel found that the Department's action in this case, including initiating arbitration against the Postal Service, were insufficient and that the Department's settlement of the disputed issues regarding vending machine income with the Postal Service prior to the arbitration hearing was "against public policy" and "contrary to the Act and its intent." (Appendix C p. 24)

The arbitration panel awarded Martin $449,923 in damages, composed of vending machine income not remitted to her by the Postal Service; lost income attributed to the prices established for the other vending machines on the property, the Department's failure to remodel Martin's facility and the termination of Martin's license; and attorneys' fees. (Appendix D, p. 6)

B. The District Court Review

The Department sought judicial review of the panel's award in U.S. District Court as provided in the Act. The Department alleged that the arbitration award violated the Eleventh Amendment and the procedural and substantive due process clauses of the Fifth Amendment. (Appendix B, p. 9) The Department's complaint articulated specific errors on the part of the arbitration panel, and sought a declaration that the panel's award was an unconstitutional and illegal exercise of power and abuse of discretion. (Appendix B, p. 9)

In its motion for disqualification of the arbitration panel, heard in conjunction with the parties' motions for summary judgment, the Department articulated additional significant errors to establish the Department's claim that the panel abused its discretion. Among others, the Department asserted that the Act provides no substantive right to the vendor to challenge the Department's decision not to pursue claims against the federal

agency, and that the Act imposed no duty upon the Department to collect vending machine income or remodel a vendor's facility. (Appendix B, pp. 15-16)

The district court properly reviewed the two specific allegations of error plead in the complaint under the standards of the A.P.A., despite the Department's failure to specifically plead a violation of the A.P.A. (Appendix B, pp. 15-16) The district court improperly refused, however, to consider the additional significant errors raised by the Department in its motion to disqualify the panel finding that these errors had not been specifically plead in the complaint and therefore were not properly before the court. (Appendix B, p. 20)

Following entry of judgment, the Department moved to amend its complaint to state the allegations raised in its motion prior to judgment. The district court denied the motion.

C. The Appeal to the Ninth Circuit

The Department appealed the decision of the district court to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the decision of the district court on July 11, 1997.

The Ninth Circuit's decision did not address whether the Act imposes a duty upon States to pursue vendors' complaints against a federal agency or authorizes awards of compensatory damages against a State. The court also erroneously stated that the parties did not dispute that the Act authorizes the arbitration panel to award compensatory damages. While acknowledging that the Act did not expressly provide for such awards, the Ninth Circuit nonetheless found that the Act impliedly authorized compensatory damages. (Appendix A, p. 9)

The Ninth Circuit also found that a State's agreement to participate in the Randolph-Sheppard program constitutes a waiver of its sovereign immunity against enforcement of arbitration awards for compensatory damages in federal court. This finding was based upon "overwhelming implication" from the text of the Act. The statutory text relied upon by the court

consisted of the requirement in 20 U.S.C. §107b that disputes with vendors be submitted to arbitration; the description in 20 U.S.C. § 107d-1(a) of such arbitration as "binding;" the provision in 20 U.S.C. § 107d-2 that the arbitration was subject to judicial review under the A.P.A.; and the provision of 5 U.S.C. § 703 of the A.P.A. stating that agency action is subject to judicial review "for judicial enforcement." (Appendix A, pp. 7-8)

REASONS FOR GRANTING THE PETITION

The Courts of Appeals have diverged dramatically in their interpretation of the duties, potential liabilities and sovereign immunity of the States participating in the Randolph-Sheppard program. As a result, some States are subjected to liability for monetary damages to vendors under the Act while other States are immune from such liability. The intervention of this Court is required to ensure the application of one certain and uniform standard to the States participating in this national program.

A. A Conflict Exists in the Courts of Appeals' Interpretations of Whether a State's Participation in the Randolph-Sheppard Program Constitutes an Implied Waiver of Immunity

The Courts of Appeals have reached inconsistent and irreconcilable conclusions regarding whether an award of damages and enforcement of such award in federal court under the Act is precluded by the Eleventh Amendment and principles of sovereign immunity.

The Third Circuit has concluded that a State's participation in the program created by the Act constitutes a waiver of its Eleventh Amendment sovereign immunity against awards of compensatory damages made under the Act. *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985). The Ninth Circuit in the instant case arrived at

the same conclusion. The Sixth Circuit, in sharp contrast, concluded that States do not waive their Eleventh Amendment immunity from enforcement of damage awards in federal court by agreeing to participate in the program created by the Act. *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Eighth Circuit, in a decision in which all three judges wrote separately, could not reach agreement on the issue of waiver of immunity. *McNabb v. U.S. Dept. of Education*, 862 F.2d 681 (8th Cir. 1988). The individual judges respectively concluded that: (1) the Act constituted a Congressional abrogation of States' immunity; (2) Congress had not expressed an intention to subject States to liability for damages; and (3) Congress had authorized awards of prospective but not retroactive compensatory damages.

This Court has spoken clearly, holding that a State's waiver of its sovereign immunity must be unequivocally expressed. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). A State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other construction. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985). This Court has described the standard for establishing a waiver of a State's Eleventh Amendment immunity as "stringent." *Atascadero State Hospital v. Scanlon*, 473 U.S. at 241; *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

Despite this Court's clear instructions, the Third Circuit in *Delaware Dept. of Health* and the Ninth Circuit in this case found a waiver of States' sovereign immunity by implication from the term "arbitration." The Third and Ninth Circuits concluded that because the States participate in a program which requires arbitration of disputes, and because arbitration generally includes the potential for compensatory relief, the States knowingly and voluntarily waived their immunity from monetary damages. *Delaware Dept. of Health*, 772 F.2d at 1138.

The Sixth Circuit reached the opposite conclusion from that of the Third and Ninth Circuits. Citing this Court's decisions in *Atascadero State Hospital* and *Dellmuth v. Muth*, 491 U.S. 223 (1989), the Sixth Circuit in *Tennessee Dept. of Human Services*, appropriately searched the text of the Act for an expression by Congress of "unmistakable intent" to abrogate the State's Eleventh Amendment immunity. *Id.*, at 1167. The court found "no mention" of "the possibility that a citizen might sue the state in federal court, of retroactive damages, or of sovereign immunity." *Id.* In the absence of textual expression, the Sixth Circuit found that while the Act authorizes an arbitration panel to award compensatory damages under the Act, States enjoy sovereign immunity from a vendor's attempt to enforce such an award in federal court. *Id.*

The Sixth Circuit refused to imply a waiver of immunity from the "mere reference" in the Act to binding arbitration. *Id.* Such reference, the court found:

> ". . . does not unmistakably suggest that a vendor will be able to collect retroactive damages in federal court or that a state will surrender its sovereign immunity. According to the Supreme Court, much more explicit language is required to abrogate or waive a State's sovereign immunity.
>
> The text of the Randolph-Sheppard Act reflects neither an unmistakable intention by Congress to abrogate the State's sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity."

Id.

Similarly, in *McNabb*, Judge Doty of the Eighth Circuit found that Congress had failed to unambiguously provide in the Act that a State's participation constituted a waiver of immunity from damages or to condition a State's participation on

accepting liability for all forms of relief including retroactive damages. *Id.*, at 687.

The Ninth Circuit's conclusion in the decision below is in direct conflict with that of the Sixth Circuit. Moreover, the decisions of the Third and Ninth Circuits ignore the guidance regarding waivers of sovereign immunity provided by this Court in *Lane v. Pena*, ___ U.S. ___ , 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). In *Lane*, this Court held that a waiver of sovereign immunity must be "unequivocally expressed" in the statutory text and will not be implied. *Id.*, at 493. This Court expressly distinguished between a waiver of the government's sovereign immunity as to liability and a waiver of immunity from monetary damage awards, finding that Congress' waiver of immunity as to liability is not equivalent to a waiver of immunity as to money damages. *Id.*, at 495. Thus, even where a cause of action is authorized against the government, this Court has stated that the available remedies do not include money damages absent an express waiver of sovereign immunity as to such damages. *Id.*, at 496.

Although *Lane* involved a purported waiver of sovereign immunity by the federal government, its holding has equal application to a waiver of sovereign immunity by a State. Applying the principles articulated in *Lane* to the Act, no waiver of immunity as to damages can be found since the Act does not specifically express that a State must agree to subject itself to liability for money damages in order to participate. Absent such express consent by the States, the agreement to arbitrate disputes cannot be interpreted as a waiver of immunity as to money damages, but merely a consent to resolve disputes via arbitration.

At present, States are subject to differing interpretations of the Act, with the inequitable result that some States are subject to liability for damages under the Act while others are not. A substantial and significant conflict exists among the Courts of Appeals regarding whether a State's agreement to participate in the program created by the Act and to arbitrate vendors'

disputes creates a waiver of the State's Eleventh Amendment and sovereign immunity. That conflict can only be resolved by this Court.

B. A Conflict Exists in the Courts of Appeals' Interpretations of the Duties Imposed by the Act Upon the States

The Circuit Courts of Appeals have also reached irreconcilable and divergent conclusions regarding the duties imposed upon the States by the Act. A threshold issue exists whether the Act imposes a duty on the State to pursue a vendor's grievances against a federal agency. No such duty is expressly created by the Act. The Eleventh Circuit concluded that States have no duty to pursue remedies against the federal government on behalf of vendors. In stark contrast, the Ninth Circuit upheld the finding of the arbitration panel that the Department owed a duty to the vendors to remedy wrongful actions of the federal government by arbitration and even through litigation, if necessary.

The Eleventh Circuit Court of Appeals in *Georgia Department of Human Resources v. Bell*, 915 F.2d 1482 (11th Cir. 1990), concluded that the Act does not create a cause of action for damages for a State's alleged failure to pursue a vendor's complaints against a federal agency, because the Act at 20 U.S.C. § 107d-1(b) expressly gives the State discretion to seek arbitration with the federal agency. *Id.*, at 1487-88.

In contrast, the Ninth Circuit accepted without analysis the finding that the Department had a duty to pursue Martin's claims against the federal government. The arbitration panel found that the Department was obligated to remedy the failure of the Postal Service to provide Martin with income from vending machines operated by a private vendor under contract with the Postal Service. The panel found that the Department was required to pursue Martin's demands for such income "through arbitration and litigation, if necessary." (Appendix C,

p. 21). The decision removes any discretion on the part of the State whether to bring an arbitration. This expansive and unsupported interpretation of the obligations imposed on the States by the Act is directly contrary to that of the Eleventh Circuit in *Georgia Dept. of Human Resources*.

The opposing results reached by the Ninth and Eleventh Circuits create significant conflict concerning the scope of a State's obligations under the Act with respect to a vendor's complaints against a federal agency. Such conflicting results can only be resolved by this Court.

C. A Conflict Exists in the Courts of Appeals' Interpretation of the Statutory Authority of the Arbitration Panel to Award Damages Against a State

The Courts of Appeals have similarly diverged in determining whether the Act, as a matter of statutory construction, authorizes an arbitration panel to award compensatory damages against a State. The Third and Sixth Circuit Courts of Appeals, as well as the Ninth Circuit in the instant case, have held that as a matter of statutory construction, the Act authorizes the arbitration panel to award compensatory damages against a State. *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985); *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Eighth and Eleventh Circuits reached a contrary result. Although divided in its rationale, the Eighth Circuit found that an arbitration panel was not authorized by the Act to award retroactive compensatory damages. *McNabb v. U.S. Dept. of Education*, 862 F.2d 681 (8th Cir. 1988). The Eleventh Circuit found that no damage remedy was available under the Act for a vendor who complained of the State's failure to arbitrate the vendor's complaints regarding actions of the federal government. *Georgia Department of Human Resources v. Bell*, 915 F.2d 1482 (11th Cir. 1990)

In concluding that damages were available, the Third Circuit in *Delaware Dept. of Health* found that the term "arbitration" had a "well-recognized meaning" and that awards of compensatory relief by arbitrators in other contexts were "common." *Id.*, at 1136. Finding the statutory language "unambiguous," the Third Circuit found that the Act authorized awards of compensatory damages against a State. *Id.*, at 1137.

Similarly, the Sixth Circuit stated that Congress was "surely aware" that arbitration panels "routinely awarded" retroactive relief. *Tennessee Dept. of Human Services*, 979 F.2d at 1165. Accordingly, the court found that an award of compensatory damages against a State was within the statutory authority of an arbitration panel convened under the Act. *Id.*

The Ninth Circuit in the instant case adopted the rationale of the Third and Sixth Circuits that the use of the term "arbitration" in the Act provides statutory authority for an award of compensatory damages.

These decisions contrast sharply with the results reached by the Eighth and Eleventh Circuits. In *Georgia Dept. of Human Resources*, the Eleventh Circuit concluded that an award of damages was inconsistent with the remedial structure of the Act. The court reasoned that any vendor complaints against the federal government which the State elected to pursue would be subject to arbitration between the State and federal agency under 20 U.S.C. §107d-1(b). The court found that no arbitration panel hearing the vendor's claims against the State could competently assess what might have resulted from an arbitration between the State and federal government which did not occur. Accordingly, the Eleventh Circuit concluded that Congress could not have intended to create a cause of action for damages arising out of a State's failure to pursue arbitration against the federal government. *Id.* at 1486-87.

In *McNabb*, the Eighth Circuit concluded that the Act does not permit awards of retroactive compensatory damages against a State. One of the two judges who reached this conclusion, Judge Fagg, found that there was no statutory authority for an

award of any type of damages against a State. *Id.*, at 687. Judge Fagg found that although Congress undoubtedly had the authority to condition participation in the program upon acceptance of exposure to liability, the Act contained no reference to monetary remedies and failed to clearly inform the States considering participation that liability could result. *Id.*, at 686. Judge Fagg noted that this Court's precedents required that Congress "speak with a clear voice" and expressly articulate any conditions it sought to impose upon participating States. *Id.*, at 686-87. Judge Fagg rejected the analysis of the Third Circuit in *Delaware Dept. of Health*, because it required States "unwittingly to expose themselves to potentially sizeable financial obligations" on the strength of an "oblique reference to a dispute resolution mechanism that encompasses multiple remedies, including many with non-monetary characteristics." *Id.*, at 687. Judge Doty, writing separately, interpreted the Act "against the backdrop of the Eleventh Amendment," and agreed that the Act did not authorize the panel to award retroactive compensatory damages. *Id.* Judge Doty parted company with Judge Fagg in one respect, however, concluding that Congress had authorized awards of "prospective" damages. *Id.*

The interpretation of the Act advanced by the Third, Sixth and Ninth Circuit Courts of Appeals differs not only from that of the Eighth and Eleventh Circuits, it is also inconsistent with prior holdings of this Court. This Court has refused to interpret federal statutes as imposing liability for monetary damages upon the States absent a "clear and manifest intent" upon the part of Congress. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). In interpreting 42 U.S.C. § 1983, this Court stated that Congress must make its intention "clear and manifest" if it intends to alter the "usual constitutional balance between the States and the Federal Government," preempt the historic powers of the States or impose a condition upon the grant of federal monies. *Id.*, at 65. Further, this Court stated that any interpretation of whether a federal statute imposes liability must consider the principle of sovereign immunity. Recognizing that it is "an established principle of jurisprudence

that the sovereign cannot be sued in its own courts without its consent," this Court refused to conclude that Congress in enacting Section 1983 "intended to disregard the well-established immunity of a State from being sued without its consent." *Id.*, at 67.

As Judge Fagg noted in *McNabb*, nowhere in the Act did Congress clearly express an intent to subject the States to awards of retroactive compensatory damages. The conclusions of the Third, Sixth and Ninth Circuits that Congressional intent to authorize awards of money damages is implicit in the term "arbitration" falls far short of the "clear and manifest" expression required by this Court. As succinctly stated by the Sixth Circuit in *Tennessee Dept. of Human Services*, the "mere reference" to binding arbitration in the Act does not "unmistakably suggest" that a vendor will be able to collect damages in federal court or that a state will surrender its sovereign immunity. *Id.*, at 1168.

The Act's silence with respect to awards of compensatory damages has also resulted in conflicting interpretations by the U.S. Department of Education, the agency with responsibility for administration of the Act. Prior to the case at bar, the Department of Education had consistently taken the position that awards of compensatory damages are not available against a State. *Delaware Dept. of Health*, 772 F.2d at 1135 (federal government took the position that the arbitration award was contrary to the principle of sovereign immunity embodied in the Eleventh Amendment and not authorized by the Act); *McNabb*, 862 F.2d at 683 (federal government took the position that compensatory relief was not contemplated by the Act and such awards would be contrary to principles of sovereign immunity); *Georgia Dept. of Human Resources*, 915 F.2d at 1486 (federal government joined the state agency in challenging the arbitration award on Eleventh Amendment grounds); *Tennessee Dept. of Human Services*, 979 F.2d at 1165 (federal government supported the argument of the state agency that the Eleventh Amendment barred the arbitration award). Indeed, in the

district court below, the federal government did not oppose the Department's motion for summary judgment in which it asserted that the Eleventh Amendment prohibited an award of damages against a State by an arbitration panel under the Act. (Appendix B, p. 10)

Acknowledging that it was reversing its long-standing position, the federal government in its brief to the Ninth Circuit adopted the position that the Act authorizes awards of compensatory damages against the States, while continuing to argue that enforcement of such awards in federal court is barred by the Eleventh Amendment. The federal government's reversal of its long-standing interpretation of the Act as precluding compensatory damages against a State is significant. It illustrates that the Act does not clearly express an intent to impose such damages upon the States and that the States in agreeing to participate did not knowingly consent to and waive their immunity against awards of compensatory damages.

The Courts of Appeals' conflicting interpretations of the Act create substantial inequity regarding the liabilities of the States and can be resolved only by this Court's definitive interpretation of whether the Act authorizes an arbitration panel to award damages against a State. A substantial issue exists whether the language of the Act meets the standard required by this Court for imposition of liability upon the States. The imposition of financial liability upon States by implication creates an unfortunate incentive for States to "steer clear of laudable federal-state programs for fear of incurring hidden but nonetheless substantial financial liability." *McNabb*, at 687.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: October 6, 1997.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Plaintiff-Appellant,

v.

JEANA MARTIN; The United States Department of Education; RICHARD W. RILEY, Secretary of the United States Department of Education,
Defendants-Appellees.

No. 96-55456

D.C. No. CV-95-00546-JGD

OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
June 9, 1997—San Francisco, California

Filed July 11, 1997

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Nelson

OPINION

D.W. NELSON, Circuit Judge:

Brenda Premo, in her official capacity as the Director of the California Department of Rehabilitation (the "State"), appeals the district court's grant of summary judgment to Jeana Martin, the United States Department of Education, and Secretary of Education Richard Riley. Martin, formerly a blind vendor licensed under the Randolph-Sheppard Vending Stand Act (the "Act"), 20 U.S.C. §§ 107-107f, invoked the arbitration provisions of the Act in order to resolve a dispute between herself and the Department of Rehabilitation. An arbitration panel convened by the United States Department of Education awarded Martin damages, injunctive relief, and attorney's fees. The State subsequently brought suit in federal district court, claiming that the Eleventh Amendment prohibits Randolph-Sheppard arbitration panels from awarding compensatory relief. In the alternative, the State argued that the arbitration proceedings violated due process. Martin counterclaimed, seeking judicial enforcement of the award. The State responded that the Eleventh Amendment bars the enforcement of such awards in federal court. The district court granted Martin's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107-107f, establishes a cooperative federal-state program that provides employment opportunities for the blind. The Act grants priority to blind persons who desire to operate vending facilities on federal property. 20 U.S.C. § 107(b). At the federal level, the Secretary of Education is charged with the overall responsibility for administering the Act. 20 U.S.C. §§ 107(b), 107a(a).

At the state level, state licensing agencies ("SLAs") designated by the Secretary of Education implement the program.

20 U.S.C. § 107a(a)(5). State participation in the program is voluntary, and a state agency seeking to be designated as a Randolph-Sheppard SLA must apply to the Secretary of Education and agree to a number of conditions. For example, the Act requires SLAs to give preferences to blind persons in need of employment, 20 U.S.C. § 107a(b), to negotiate with federal agencies for the operation of vending facilities on federal sites, 20 U.S.C. § 107a(c), and to equip the facilities, 20 U.S.C. § 107b(2). In addition, the state agency must:

> make application to the Secretary and agree —
>
> . . . .
>
> (6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

20 U.S.C. § 107b(6).

The facts relevant to this case are not in dispute. In 1985, the California Department of Rehabilitation, the designated SLA for the State of California, issued a license to Jeana Martin. The license permitted her to operate a snack bar and lunch room at the General Mail Facility of the United States Post Office in Santa Ana, California. Martin left the position in 1991 when she experienced financial losses and other difficulties. Although she relocated to other sites, her financial condition worsened, and the State revoked her license in 1992.

During this period, Martin twice requested a state hearing. In 1990, she filed a complaint alleging that the State had violated the Act by failing to take adequate steps to ensure compliance by the Postal Service. In 1992, she challenged the

State's termination of her vendor's license. In both cases, Martin was denied relief.

To contest these decisions, Martin invoked her right to arbitration by a panel convened by the Secretary of Education under 20 U.S.C. §§ 107d-1, 107d-2. Pursuant to the terms of the statute, Martin selected one panel member, the State selected another, and the panel members designated by Martin and the State agreed to a third person who chaired the panel.

During the course of the proceedings, the panel refused a number of the State's requests. First, the panel declined to grant a continuance to the State's attorney. When the State objected to Martin's selection of Robert Humphreys as a panel member because Humphreys previously had expressed a view about one of the legal issues affecting Martin, the panel chair overruled the objection. During the hearing, the panel admitted, over the State's objection, the testimony of Durward McDaniel, an attorney who had previously advised Martin.

In August of 1994, the panel ruled in favor of Martin. The panel determined that the State had violated the Act by refusing to secure the renovation of the vending facilities at Santa Ana, by failing to insist on assignment of income from competing vending machines to Martin, and by declining to take effective steps to prevent the Postal Service from renewing a contract with another vendor. Reasoning that these lapses were the cause of Martin's financial difficulties, the panel also concluded that the State had improperly terminated her license. In December 1994 the panel awarded Martin $379,025.05 in lost income and $70,898.65 in attorney's fees and costs. The panel also ordered the State to reinstate Martin's license, to restore her to a comparable vending facility, and to pay her at a rate of $5,731.94 per month until she is restored.

The State then filed this federal action, naming the Secretary of Education, the United States Department of Education

("federal defendants"), and Martin as defendants. The State claimed that the Eleventh Amendment prohibits Randolph-Sheppard arbitration panels from awarding compensatory relief and bars the enforcement of such awards in federal court. In the alternative, the State alleged that the denial of the continuance, Humphreys' participation as a panel member, and the admission of McDaniel's testimony amounted to a violation of due process. Martin counterclaimed, seeking enforcement of the arbitral award. Both the State and Martin filed motions for summary judgment. The federal defendants did not oppose the State's motion for summary judgment on Eleventh Amendment grounds but filed a motion for partial summary judgment on all other issues.

The district court granted summary judgment to Martin, concluding that the State had waived its sovereign immunity. The court further concluded that no violation of due process had occurred because the State is not a "person" within the meaning of the Fifth Amendment, and that the award was not arbitrary and capricious. Following this decision, the State filed a motion to amend its complaint, which the district court denied. This timely appeal followed.

STANDARD OF REVIEW

The question of Eleventh Amendment immunity is a purely legal issue that we review de novo. *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995).

An arbitral award under the Randolph-Sheppard Act is reviewed as an agency action under the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* 20 U.S.C. § 107d-2. Under the APA, agency action may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *In re Transcon Lines*, 89 F.3d 559, 563 (9th Cir. 1996).

We review a district court's denial of a motion to amend a complaint for an abuse of discretion. *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 563 (9th Cir. 1994).

DISCUSSION

I. *Eleventh Amendment*

[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the Amendment does not explicitly prohibit an action against a state by one of the state's own citizens, the Supreme Court has construed the Amendment as barring such suits. *See Welch v. Texas Highways & Pub. Transp. Dep't*, 483 U.S. 468, 472 (1987) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)). Even when a state is not a named party, as is the case here, the Eleventh Amendment may bar a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). However, there are two well-recognized exceptions to the Eleventh Amendment protection from suits for damages. Congress can abrogate a state's Eleventh Amendment sovereign immunity without the consent of the state in certain instances, or a state can waive its immunity by consenting to suit in federal court. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

[2] We have not as yet had occasion to consider the intersection of the Eleventh Amendment and the Randolph-Sheppard Act. Three other circuit courts have addressed the issue, with varying results. *See Tennessee Dep't of Human*

Serv. v. United States Dep't of Educ., 979 F.2d 1162, 1166-68 (6th Cir. 1992) (holding that Eleventh Amendment does not apply to arbitration proceedings under Randolph-Sheppard Act but that it does bar proceedings in federal court to enforce arbitral awards of compensatory relief); *McNabb v. United States Dep't of Educ.*, 862 F.2d 681, 683-84 (8th Cir. 1989) (refusing to enforce compensatory damages awarded by Randolph-Sheppard arbitration panel, in per curiam judgment with each judge writing separately); *Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137-38 (3d Cir. 1985) (concluding that states participating in Randolph-Sheppard program have waived their sovereign immunity to both arbitration proceedings and federal judicial enforcement of arbitral awards). As these decisions make clear, a case such as this one presents two central questions. First, does the Eleventh Amendment prevent Randolph-Sheppard arbitration panels from awarding compensatory relief? Second, does the Amendment bar the federal courts from enforcing such awards?

The district court relied on *Delaware* to conclude that by participating in the Randolph-Sheppard program, the State has waived its sovereign immunity to both arbitral awards and federal actions to enforce such awards. Martin agrees. Citing *Tennessee*, the federal defendants take the position that the Eleventh Amendment does not limit the authority of Randolph-Sheppard arbitral panels to award compensatory relief but does bar federal courts from enforcing such awards. The State maintains that the Eleventh Amendment limits the authority of both the arbitral panels and the federal courts to fashion compensatory relief.

We affirm the decision of the district court. We conclude that the Eleventh Amendment does not apply to Randolph-Sheppard arbitration proceedings and thus does not limit the authority of arbitration panels convened under the Act to award compensatory relief. In addition, we believe that the overwhelming implication of the Act is that participating

states have waived their sovereign immunity to suit in federal court for the enforcement of such awards.[1]

A. *Authority of the Randolph-Sheppard arbitration panel to award compensatory relief*

[3] The State's position that the Eleventh Amendment deprives Randolph-Sheppard arbitration panels of the authority to award compensatory relief is wholly unsupported. The text of the Amendment clearly indicates that it does not apply to arbitration proceedings. In referring to the "Judicial power of the United States," the Amendment on its face limits only the authority of Article III courts. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (noting that "the fundamental principle of sovereign immunity" embodied in the Amendment "limits the grant of *judicial authority in Art. III*") (emphasis added). The Amendment does not purport to affect proceedings in tribunals established by statute. *See Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 567 (8th Cir. 1980) ("[A]dministrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment").

Of the three circuits to consider the effect of the Eleventh Amendment on Randolph-Sheppard arbitral proceedings, one has held that the Amendment does not apply, and another has clearly indicated its support for this view. *See Tennessee*, 979 F.2d at 1167 ("[T]he Eleventh Amendment does not apply to such an arbitration panel."); *Delaware*, 772 F.2d at 1138 (noting that position that Eleventh Amendment applies to Randolph-Sheppard arbitration panels is "hardly supportable by the text"). The third court that addressed the matter did not decide the question. *See McNabb*, 862 F.2d at 683. We follow the opinion in *Tennessee* and conclude that the Eleventh

[1]The parties do not argue, and we do not consider, the question of whether Congress abrogated the sovereign immunity of states participating in the Randolph-Sheppard program.

Amendment does not apply to proceedings before Randolph-Sheppard arbitration panels.

[4] We note that the parties do not dispute that, as a matter of statutory construction, the Randolph-Sheppard Act gives arbitration panels the authority to award compensatory relief. The Act provides that states must agree to provide blind licensees "dissatisfied with *any action* arising from the operation or administration of the vending facility program" with a hearing and to "*submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration* as provided in section 107d-1." 20 U.S.C. § 107b(6) (emphasis added). Section 107d-1(a) further provides that an arbitration panel convened to resolve a dispute between a state and a blind vendor "*shall be final and binding on the parties*" (emphasis added).

[5] It has been widely recognized that this language permits arbitration panels to award compensatory relief. *See, e.g., Tennessee,* 979 F.2d at 1165 ("The natural reading of these provisions is that the arbitration panel may consider and resolve any complaint of a vendor arising out of the program, including a complaint that the state agency has taken money to which the vendor is entitled."); *Delaware,* 772 F.2d at 1137 (noting that "the statutory language is unambiguous" in allowing compensatory relief). In drawing this conclusion, courts have emphasized that the prevailing conception at the time the Act was passed was that arbitral resolution of disputes involved awards of back pay and other forms of compensatory relief. *See, e.g., Tennessee,* 979 F.2d at 1165; *Delaware,* 772 F.2d at 1136.

Thus, while it is true that the Act does not refer expressly to compensatory relief and one circuit judge has concluded that the Act does not permit such relief, *see McNabb,* 862 F.2d at 687, this view has been largely discredited. Indeed, the federal defendants, who in the past have argued that the Act did not permit such relief, now concede that their prior posi-

tion was incorrect. Accordingly, we conclude that the arbitration panel had the authority to award compensatory relief to Martin.

B. *Enforcement of compensatory Randolph-Sheppard arbitral awards in federal court*

[6] Consent by a state to be subject to judicial enforcement of a damages award has long been recognized as an exception to Eleventh Amendment immunity. *See, e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 308-09 (1990); *Atascadero*, 473 U.S. at 238. A state will be deemed to have waived its sovereign immunity when (1) the state expressly consents to suit; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity. *Micomonaco*, 45 F.3d at 319. However, waiver will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Authority*, 495 U.S. at 305 (alteration in original) (internal quotations and citations omitted).[2]

[7] In this case, the State of California has not expressly consented to suit. Nor has California enacted a statute that provides for waiver. The California statute establishing the state counterpart to the federal Randolph-Sheppard program does provide that the decision of an arbitration panel "shall be final and binding on the parties except as otherwise provided in the act." Cal. Welf. & Inst. Code § 19635 (West 1991). While this statute clearly reflects California's intent to be bound by Randolph-Sheppard arbitral awards, it does not pro-

[2]While the Supreme Court recently has narrowed the circumstances in which Congress has the authority to abrogate sovereign immunity, even when Congress's intent to do so is explicit, the Court's ruling does not affect the "unremarkable, and completely unrelated" matter of state waiver. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1128 (1996).

vide clear enough consent to suit in federal court to amount to an express statutory waiver of sovereign immunity. *See Atascadero*, 473 U.S. at 241.

[8] However, the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming. The statute explicitly requires participating states to agree to a number of conditions. Specifically, each state agency "shall . . . agree" to provide any dissatisfied blind vendor with the opportunity for a fair hearing and "to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration." 20 U.S.C. § 107b. The statute further provides that arbitration "*shall be final and binding on the parties.*" 20 U.S.C. § 107d-1(a) (emphasis added). In addition, the arbitration decision "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 U.S.C. §§ 701-706 of the APA]." *See* 20 U.S.C. § 107d-2. The APA provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Thus, by requiring the states to submit to "binding" arbitration, and by providing for appeal and review under the APA, the Randolph-Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable.

[9] We believe that these statutory provisions also reflect participating states' consent to the enforcement of arbitration awards in *federal* court. The Randolph-Sheppard Act is federal, and an agency of the federal government, the Department of Education, is charged with the responsibility of convening arbitration panels under the Act. It is true, as the federal defendants point out, that the Act does not specifically designate federal courts as the proper tribunals for the enforcement of such awards. Blind vendors might be able to bring suit in state court to enforce arbitration awards. Yet the fate of such suits is uncertain, as state doctrines of immunity may apply. *See Tennessee*, 979 F.2d at 1169 n.4. We do not

think that the mere possibility of state court enforcement satisfies the statute's command that arbitration must be binding.

[10] Under these circumstances, there is no "room for any other reasonable construction" of the statute. *Port Authority*, 495 U.S. at 305. The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court.

II. *Arbitral Award*

The State contests the arbitral award on a number of grounds. All of these arguments are without merit.

A. *Due process and judicial review under the APA*

In its federal complaint, the State alleged that the arbitral proceedings violated due process in several respects. Because the State is not a "person" for the purposes of the Fifth Amendment, the State's reliance on the Due Process Clause was misplaced. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). The State should have invoked the judicial review provisions of the APA, which the Randolph-Sheppard Act designates as imposing the proper standard for evaluating an arbitral award. 20 U.S.C. 107d-2(a). Under the APA, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see In re Transcon Lines*, 89 F.3d at 563. The district court evaluated the State's claims under the APA standard and rejected each in turn. We affirm the district court's decision.

[11] First, the State contends that the selection of Humphreys as a panel member was inappropriate because he had written a letter to State officials in 1990, at the request of Martin's former attorney. The State maintains that Humphreys's presence on the panel created "evident partiality," in

violation of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2). Even if the FAA were applicable here, because Humphreys's prior involvement with Martin was fully disclosed, the State has not made the required showing of "actual bias" by "specific facts which indicate improper motives." *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir.) (quotations and citation omitted) (upholding award of arbitration panel consisting entirely of employees and authorized dealers of one party), *cert. dismissed*, 117 S. Ct. 30 (1996). Moreover, the Randolph-Sheppard Act itself permits at least a minimal degree of partiality by allowing each party to select a panel member. 20 U.S.C. § 107d-2(b)(1). Rather than prohibiting individuals with pre-existing relationships from becoming panel members, the Act instead seeks to neutralize any bias by requiring the parties to agree on a third panel member, the chair. *Id.* Viewed in light of these provisions, the panel's refusal to disqualify Humphreys was not arbitrary, capricious or an abuse of discretion.

[12] Second, the State argues that the panel abused its discretion by denying the State's request for a 60-day continuance. Yet there is no evidence that the denial was improper. The parties had agreed to the hearing date five months in advance. In addition, the panel denied the continuance a full two months before the scheduled date, leaving the State ample time to prepare. Accordingly, we conclude that the panel's decision was not arbitrary, capricious, or an abuse of discretion.

[13] The State's third contention, that the panel improperly admitted the expert testimony of McDaniel, Martin's former lawyer, is also without merit. McDaniel's testimony, which concerned the legal requirements of the Randolph-Sheppard Act, was relevant. The State had the opportunity to demonstrate any bias McDaniel may have had on cross-examination. It was not arbitrary, capricious, or an abuse of discretion for the panel to admit McDaniel's testimony.

We affirm the district court's decision that the arbitration proceedings complied with the APA.

B. *The State's post-judgment motion to amend its complaint*

The State moved to amend its complaint under Rule 15(a) of the Federal Rules of Civil Procedure *after* the district court issued a final judgment in this case. Because it had improperly framed its procedural objections to the arbitration as due process challenges, the State sought to restate its claims under the APA. In addition, the proposed amended complaint contained new allegations forming the basis for additional claims.

[14] While Rule 15(a) establishes that leave to amend should be "freely given," post-judgment motions to amend are treated with greater skepticism than pre-judgment motions. *See* Charles Alan Wright & Arthur Miller, 6 *Federal Practice and Procedure* § 1489 (1990). The likelihood that amendment will cause undue delay in the proceedings is a legitimate rationale for denying a motion to amend. *See Janicki,* 42 F.3d at 566. After a judgment has been issued, the conclusion that amendment will cause undue delay is particularly justified. *See id.* at 566-67. Here, the district court treated the State generously, analyzing its claims under the proper legal standard even though that standard was not articulated in the complaint. Moreover, the State had ample opportunity to file an amended complaint with new allegations before the court issued its final judgment. Under these circumstances, it was not an abuse of discretion for the court to refuse to allow the State to expand its case after a final decision had been made.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

FILED
Clerk, U.S. District Court
FEB 6, 1996
Central District of California
By /s/ J. Holmes, Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRAP, RULE 77(d).

BRENDA PREMO, As Director of
the Department of Rehabilitation,
State of California,
Plaintiff,

v.

JEANA MARTIN; THE UNITED STATES
DEPARTMENT OF EDUCATION; and
RICHARD RILEY, Secretary of the
United States Department of Education,
Defendants.

CASE NO. CV 95-0546 JGD

JUDGMENT

The evidence and issues presented having been fully considered, and a decision having been duly rendered, the Court hereby ORDERS that judgment be entered in favor of Defendants Jeana Martin, the United States Department of Education, and Richard Riley, and against Plaintiff Brenda Premo, on all claims for relief alleged in the complaint, and that judgment be entered in favor of Defendant Jeana Martin, and against Plaintiff Brenda Premo, on the claims for relief alleged

in the counterclaim. It is hereby ordered and adjudged that the Plaintiff shall comply forthwith with the December 27, 1994 order of the arbitration panel.

IT IS SO ORDERED.

Dated: Feb 6, 1996

/s/ JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

CV 95-546-JGD(CTx)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

FILED
Clerk, U.S. District Court
FEB 6, 1996
Central District of California
By /s/ J. Holmes, Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRAP, RULE 77(d).

BRENDA PREMO, As Director of
the Department of Rehabilitation,
State of California,
Plaintiff,

v.

JEANA MARTIN; THE UNITED STATES
DEPARTMENT OF EDUCATION; and
RICHARD RILEY, Secretary of the
United States Department of Education,
Defendants.

CASE NO. CV 95-0546 JGD

ORDER (1) DENYING PLAINTIFF'S MOTION FOR DISQUALIFICATION OF THE ARBITRATION PANEL, AND REVERSAL OF THE PANEL DECISION, (2) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND (4) GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On November 20, 1995, the following motions came on for hearing: (1) Plaintiff's Motion for Disqualification of the Arbitration Panel, for Reversal of the Panel Decision, and for Remanding to the U.S. Department of Education for a New Arbitration Panel, and Hearing (hereinafter "Motion for Disqualification of the Arbitration Panel"); (2) Plaintiff's Motion for Summary Judgement, (3) Defendant Jeana Martin's Motion for Summary Judgment, and (4) Motion of Defendants United States Department of Education and Richard Riley for Partial Summary Judgment.

The Court, having considered the parties' written submissions, and the oral arguments of counsel, hereby DENIES the Plaintiff's Motion for Disqualification of the Arbitration Panel, DENIES Plaintiff's Motion for Summary Judgment, GRANTS Defendant Jeana Martin's Motion for Summary Judgment, and GRANTS the Motion of the Defendants United States Department of Education and Richard Riley for Partial Summary Judgment.

Background

Plaintiff Brenda Premo brings this action in her official capacity as Director of the Department of Rehabilitation, State of California, for review of an arbitration panel's decision to award damages for violations of the Randolph-Sheppard Vending Stand Act, ("the Act") 20 U.S.C. § 107-107f.

The named Defendants are Richard Riley, Secretary of the United States Department of Education, and the United States Department of Education (the "Federal Defendants"), which convened the arbitration panel, and Jeana Martin, a blind vendor licensed by the Department of Rehabilitation pursuant to the provisions of the Act.

The Randolph-Sheppard Vending Stand Act

Congress enacted the Randolph-Sheppard Vending Stand Act to give blind persons employment and economic opportunities. The act authorizes blind persons to operate vending facilities on federal property. 20 U.S.C. § 107(b).

The Rehabilitation Services Administration of the U.S. Department of Education is responsible for overseeing the administration of the Act's programs and provisions on the federal level. 20 U.S.C. § 107a. The Act requires the Secretary of the Department of Education (the "Secretary") to prescribe regulations to assure that, wherever feasible, one or more vending facilities are established on all federal property, and that blind vendors licensed under the Act receive priority to operate these facilities.

In addition, the Secretary designates a state licensing agency to administer the Act within each state. 20 U.S.C. § 107a(a)(5). The state licensing agency issues vending licenses to the blind vendors, selects locations for vending facilities on federal property, and selects the type of vending facility to be provided to the vendor. The licensing agency also provides the blind licensee an initial stock of inventory for the vending facility and a petty cash fund. 20 U.S.C. § 107b(2). Thereafter, the vendor is entitled to profits and responsible for losses. The vendor is also responsible for other operating expenses, including the replacement of inventory and the payment of sales tax. *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F. Supp. 292, 296 (D.D.C. 1990).

To resolve grievances that may arise between a blind vendor and the state licensing agency the Act provides a set of remedial procedures. Title 20 U.S.C. § 107b(6) provides that any state agency desiring to be a state licensing agency under the Randolph-Sheppard Act must agree:

> to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair

> hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

The procedures for selecting the arbitration panel are set forth in section 107d-2. The Secretary shall convene an ad hoc arbitration panel upon receipt of a complaint filed by a blind vendor. The panel is to be composed of three members: one designated by the state licensing agency, one designated by the blind licensee, and one member, jointly designated by the other two members, and who serves as chairman of the panel. 20 U.S.C. § 107d-2(b)(1).

The only restriction the Act places on the selection of arbitration panel members is that the chairman may not be employed by the state licensing agency, or its parent agency. 20 U.S.C. § 107d-2(a)(1)(c).

Section 107d-2 also provides that the decision of the arbitration panel shall be considered the final agency action of the Department of Education, and is reviewable under the Administrative Procedure Act, 5 U.S.C. § 706.

Facts

The California Department of Rehabilitation is the state licensing agency responsible for administering the Act in California. In 1985 the Department of Rehabilitation licensed Defendant Jeana Martin as a vendor, pursuant to the provisions of the Act. From 1985 to 1991, Martin operated a snack bar/lunchroom, and placed several vending machines at the General Mail Facility of the United States Postal Service in Santa Ana, California.

On June 25, 1992, the Department of Rehabilitation revoked Martin's license as a vendor for unsatisfactory performance. Martin, after exhausting her administrative appeals, filed a complaint for arbitration with the Secretary. The complaint alleged that the Department of Rehabilitation failed to protect

Martin's priority to operate vending facilities as required by the Act. Specifically, the complaint alleged that the Department of Rehabilitation failed to take effective action when the management of the General Mail Facility entered into an unlawful "break-even" contract with a commercial vending company, Canteen Corporation. This Contract authorized Canteen Corporation to operate vending machines at the General Mail Facility in direct competition with Martin, and at prices with which Martin was unable to compete. The complaint also alleged that the Department of Rehabilitation failed to remodel the snack bar/lunchroom despite its recognition that remodeling was necessary to assure Martin the effective conduct of the business. As a result of these failures to protect Martin's rights under the Act, Martin suffered a substantial loss of business, and the subsequent termination of her license.

The Secretary convened an arbitration panel. Pursuant to the provisions of the Act, Martin and the Department of Rehabilitation each appointed one individual to the arbitration panel. Martin selected Robert R. Humphreys and the Department of Rehabilitation selected Joan Silverman. These two members jointly selected Edna E.J. Francis to serve as the third member of the panel, and chairperson.

On April 14 and 15, 1994, the arbitration panel conducted a hearing. In an order dated August 18, 1994, the panel expressed its findings that the Department of Rehabilitation failed to protect Martin's rights as a vendor under the Act, and that this failure caused a substantial loss of business. The panel also found that the Department of Rehabilitation then shifted the blame for the loss of business to Martin, an as a result, wrongfully terminated her license as a vendor. In a subsequent order, dated December 27, 1994, the Panel awarded Martin $449,923.70 in damages for loss of income, as well as attorney's fees and costs. The panel also ordered the Department of Rehabilitation to reinstate Martin's license, and to place her in another vending facility comparable to the one at the General Mail Facility.

Procedural History

On January 27, 1995, Brenda Premo, as Director of the California Department of Rehabilitation, filed the complaint in this action for declaratory judgment, and a petition for review of the decision and award of the ad hoc arbitration panel pursuant to 20 U.S.C. § 107d-2. The complaint alleges that the arbitration panel lacked authority to award, or to enforce any award for damages against the State pursuant to the Eleventh Amendment of the U.S. Constitution.

The Complaint alleges further that the panel violated the Fifth Amendment of the Constitution because the arbitration proceeding violated the Plaintiff's substantive and procedural due process rights. Specifically, the complaint alleges that one of the panel members, Robert Humphreys, previously served as an advocate on Martin's behalf, and his presence on the panel substantially prejudiced the Plaintiff's case. The complaint also alleges that the panel wrongfully permitted the testimony of Durward McDaniel, who participated in the arbitration as both a witness and an advocate on Martin's behalf.

The complaint prays for judgment declaring the award of the Arbitration Panel an unconstitutional and illegal exercise of power by the Panel, and an improper abuse of discretion. In the alternative the complaint prays for an order reversing the decision of the Panel and remanding the matter for a new arbitration hearing.

Martin filed a counterclaim on April 14, 1995, praying for an order "[a]pproving the orders of the arbitration panel in all respects and finding that the orders were not arbitrary, capricious, abuses of discretion and are otherwise in accordance with the law." Answer and Counterclaim of Defendant Jeana Martin to Plaintiff's First Amended Complaint, Prayer for Relief ¶ 1.

Discussion

1) Plaintiff's Motion for Summary Judgment

On August 18, 1995, the Plaintiff filed a motion for summary judgment. The Plaintiff argues that the Court should declare the Panel's decision unenforceable and unconstitutional under the Eleventh Amendment of the United States Constitution.

Martin opposes the Plaintiff's motion for summary judgment, and on September 7, 1995, filed a motion for summary judgment seeking judgment on the counterclaim. The Federal Defendants do not oppose the Plaintiff's motion for summary judgment.

Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court clarified the standard for summary judgment in three important case. *See Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; a fact is material if it may affect the outcome of the suit. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative admissible

evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex,* 477 U.S. at 325; *see also* Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial §§ 14:123-141 (1993).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). Summary judgment will be entered against the non-moving party, when appropriate, if that party does not present these specific facts. *Id.*

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justified inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient. *Id.* at 252. As the Court explained in *Matsushita*, 475 U.S. at 586-87:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

However, an alleged "genuine issue" will not defeat summary judgment where the factual context makes the non-movant's allegations implausible. *See California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 848 U.S. 1006 (1988). Consequently, where the factual context makes the non-movant's claim implausible, the non-movant "must come forward with more persuasive evidence to support their claim than

would otherwise be necessary" to show that there is a genuine issue for trial. *Id.*

The Eleventh Amendment

The Plaintiff argues that the award of the arbitration panel violated the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment has been interpreted as a grant of sovereign immunity to the states against suit in federal court. *Alabama v. Pugh*, 438 U.S. 781, 782, fn.1 (1978).

Congress has the power to override the states' sovereign immunity and permit suits against states by individuals. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Congress' intent to permit suits against the states, however, must be "unmistakably clear in the language of the statute itself." Legislative history is generally irrelevant in determining whether Congress intended to abrogate the Eleventh Amendment immunity of a state. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In addition, a state can waive its Eleventh Amendment immunity, but such waiver is effective "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

In *Deleware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123 (3rd Cir. 1985), the Third Circuit held that Deleware waived its Eleventh Amendment immunity with respect to arbitration awards under the Act when it agreed to participate in the Randolph-Sheppard program. The Court

examined the language of the Act which requires states desiring to become a state licensing agency to:

> make application to the Secretary and agree . . . to provide to any blind licensee dissatisfied with any action . . . an opportunity for a fair hearing, and agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration . . . .

20 U.S.C. § 107b(6). The Third Circuit noted that when Congress enacted the provisions of the Act requiring arbitration of vendor's grievances,

> the term arbitration had a well-recognized meaning. Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. Furthermore, awards of back pay in arbitrations under collective bargaining agreements, were, by then, commonplace.

Delaware Dep't of Health & Social Servs., 772 F.2d at 1135 (citations omitted). The Court also noted that there was no indication, either in the text of the Act, or in its legislative history, that Congress "used the term arbitration in any manner different from its conventional usage in other contexts such as the Federal Arbitration Act." *Id.* at 1130. Thus, the relief an arbitration panel could award was not limited to exclude monetary damages. *Id.*

The Court held that Delaware waived any Eleventh Amendment immunity against a damage award by the arbitration panel when,

> with full notice of the Act's requirements, one of which was an agreement to arbitration, it voluntarily made application with the Secretary to participate in the Randolph-Sheppard program. The waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly.

Delaware Dep't of Health & Social Servs., 772 F.2d at 1138.

The Plaintiff argues that this Court should decline to follow *Delaware Dep't of Human Servs.*, and instead urges the court to follow the decision of the Sixth Circuit in *Tennessee Dep't of Human Services v. United States Dep't of Education*, 979 F.2d 1162, 1168 (6th Cir. 1992), and a divided opinion of the Eight Circuit in *McNabb v. U.S. Dep't of Education*, 862 F.2d 681, 683 (8th Cir. 1988). These decisions held that an award of damages by an arbitration panel convened under the Randolph-Sheppard Vending Stand Act was unenforceable in federal court because the Act does not explicitly provide for enforcement of monetary damages against a state licensing agency in federal court.

The Court finds the reasoning of the Third Circuit in *Delaware Dep't of Human Servs.* to be persuasive, and declines to follow the decisions of the Sixth and Eighth Circuits. The Randolph-Sheppard Vending Stand Act clearly and unequivocally requires states participating in the Randolph-Sheppard program to agree to submit the grievances of vendors to arbitration. As the term arbitration is used in the Act, it clearly contemplates the possibility that an arbitration panel will award monetary damages, and that such an award is reviewable in federal court as the final action of the Secretary. The overwhelming implication that may be drawn from the text of the Act is that the Act requires participating states to waive their Eleventh Amendment immunity by requiring the states to agree to these procedures to resolve the grievances of vendors.

Accordingly, the court finds that California, by agreeing to participate in the Randolph-Sheppard program, waived its Eleventh Amendment immunity to the extent of actions by vendors brought under the Act. The court therefore DENIES the Plaintiff's motion for summary judgment, and GRANTS Martin's motion for summary judgment on the counterclaim as to the Eleventh Amendment issue.

2) Plaintiff's Motion for Disqualification of Arbitration Panel

The Plaintiff also moves, in the event the Court does not vacate the award of the arbitration panel on Eleventh Amendment grounds, for an order disqualifying the arbitration panel, and reversing its decision.

The Federal Defendants and Martin oppose this motion and have filed cross-motions for summary judgment. Martin also moves for summary judgment on her counterclaim, which seeks an order affirming the arbitration award.

The Fifth Amendment

The Plaintiff claims that the decision of the arbitration panel should be reversed because the panel deprived the Plaintiff of substantive and procedural due process in violation of the Fifth Amendment of the United States Constitution.

The word "person" in the context of the Due Process Clause of the Fifth Amendment does not encompass the States of the Union. *South Carolina v. Katzenbach*, 86 S.Ct. 803, 816 (1966). Because Plaintiff is suing in her official capacity as director of the Department of Rehabilitation, Plaintiff is the State of California for purposes of the Fifth Amendment. *See El Paso County Water Imp. District v. International Boundary & Water Com'n*, 701 F. Supp. 121, 123-24 (W.D. Tex. 1988) (political subdivision of the state is not a person for purposes of Fifth Amendment). Thus the Plaintiff does not enjoy the benefits of the Due Process Clause.

The provisions of the Administrative Procedure Act, however, provide for review of a decision of an arbitration panel, and authorize the Court to vacate a decision of the panel if it is arbitrary and capricious, contrary to constitutional right, power, privilege, or immunity, is in excess of jurisdiction or authority, or unwarranted by the facts. 5 U.S.C. § 706(2). The Plaintiff, in her reply, indicates that she will file a Third

Amended Complaint, if necessary, to seek review under the standards set forth under the Administrative Procedure Act.

The Court finds that even under the standard of review described in the Administrative Procedure Act, reversal of the arbitration panel's decision would not be not warranted.

The Second Amended Complaint raises two factual bases for the Plaintiff's contention that she was denied due process in the arbitration proceeding. First the complaint states claims that Robert R. Humphreys, the arbitration panel member appointed by Martin, exhibited bias and unfairly advocated Martin's position in the proceedings. Second, the complaint alleges that the panel improperly allowed the testimony of Durward McDaniel, an attorney who testified for Martin as an expert witness on the requirements of the Act. The complaint alleges that McDaniel improperly acted as both an advocate and as a witness for Martin.

Disqualification of Mr. Humphreys As a Member of the Arbitration Panel

Pursuant to the Act, Martin and the Department of Rehabilitation each appointed one individual to the panel. Martin appointed Robert Humphreys, and the Department of Rehabilitation appointed Joan Silverman. These two panel members then jointly selected Edna Francis to serve as chairperson and third member of the panel.

At the commencement of the arbitration proceeding, counsel for the Department of Rehabilitation objected to the appointment of Mr. Humphreys to the panel. The grounds for the objection was a letter dated February 13, 1990, written by Humphreys, on behalf of Martin, to the Department of Rehabilitation. Humphreys questioned the legality of the Postal Service's contract with Canteen Corporation. As a result, the Department argued that Humphreys had already expressed an opinion relating to the issues before the panel, and should therefore be disqualified as a panel member.

The panel overruled this objection. In response to the objection the chairperson stated:

> And I just want to indicate for the record that this same issue has been brought up in the past . . . I've been asked a question whether panel members were expected to be neutral. The other panel members were expected to be neutral in the same way that I'm expected to be neutral, and there was some further discussion and we concluded the matter with the understanding that, in spite of any previous involvement of Mr. Humphreys' part or on the part of anybody else other than myself, that the panel member, the party appointed panel member, is to bring his or involvement of Mr. Humphreys' part or on the part of anybody else other than myself, that the panel member, the party appointed panel member, is to bring his or her best judgment to resolve the dispute, and that concluded it at that time.

Reporter's Transcript, at 10-11.

Section 107d-2(b)(1)(B) does not limit or qualify the selection of a panel member by either the blind vendors or the state licensing agencies. The Act places a limit only on the selection of the chairperson of the panel: that member cannot be employed by the state licensing agency. 20 U.S.C. §107d-2(b)(1)(C).

If Congress intended to restrict a vendor's selection of an arbitration panel member it could have provided for such limitations in the Act, just as it placed limits on the selection of the chairperson of the panel. Thus, Martin's selection of Humphreys did not violate the Act and does not constitute grounds to disqualify the arbitration panel.

The Plaintiff contends that, "[t]hroughout the hearing, Mr. Humphreys revealed his bias by rigorously cross-examining the plaintiff-respondent's witness . . . and by aiding in the direct examination of both Martin and McDaniel." Motion to

Disqualify the Arbitration Panel at 15. The Randolph-Sheppard Act did not limit the selection of panel members by litigants to persons totally free of bias. Thus, even if the questioning by Humphreys were evidence of bias, disqualification of the arbitration panel is not be required.

Testimony of Durward McDaniel

The Plaintiff argues further that the decision of the arbitration panel should be reversed because one witness, attorney Durward McDaniel, testified as an advocate on Martin's behalf.

Martin called McDaniel to testify as an expert witness. McDaniel in his testimony expressed a legal opinion relating to the requirements of the Act, and whether the Department of Rehabilitation fulfilled its obligations to Martin under the Act. The Department of Rehabilitation objected to McDaniel's testimony because he formerly represented Martin in connection with the operation of the General Mail Facility vending facilities.

The panel chairperson overruled the Plaintiff's objection, and stated:

> The testimony will not be stricken from the record. Obviously the panel will review Mr. McDaniel's testimony in the context in which it was given, noting that he has served as a mediator and as an advocate at various times. But I do not believe that disqualifies him as a witness. He has spoken to issues which are obviously relevant to the disposition of the case.

R.T. at 218-19.

Assuming McDaniel's prior representation of Martin was evidence of bias, it is insufficient to disqualify him from testifying at the hearing. The witness' bias, however, should be considered by the arbitration panel when weighing the witness' reviewing court).

The arbitration panel was informed of McDaniel's bias, and indicated that it would consider his bias in evaluating his testimony. Furthermore, there is no evidence that the panel actually relied upon McDaniel's testimony in reaching its decision. McDaniel's testimony is not cited in the panel's opinion. Therefore, the panel's decision to allow McDaniel to testify was not an abuse of discretion and does not warrant reversal of the panel's decision.

C) Other Issues Presented in the Motion for Disqualification of the Arbitration Panel

The Second Amended Complaint cites the presence of Humphreys as a panel member, and McDaniel's testimony, as the only two factual bases for the claim that the panel decision violated the due process rights of the state. In the motion for disqualification of the arbitration panel, however, the Plaintiff presents a number of additional grounds which she contends require reversal of the arbitration panel's decision. These grounds are: (1) the decision of the arbitration panel was not supported by sufficient evidence; (2) the arbitration panel impermissibly ascribed binding precedential value to a 1981 San Francisco arbitration action involving the Department of Rehabilitation and the Postal Service; (3) no substantive right to challenge a state licensing agency's failure to bring a complaint against a federal agency exists; (4) the Randolph-Sheppard Act imposes no legal duty on the plaintiff to collect or account for vending machine income; (5) Plaintiff was under no legal duty to perform the remodelling sought by Martin; (6) the panel lacks authority to order license restoration; and (7) the panel erroneously awarded damages based on vending machine income for a period of time before the vending machine controversy was brought to the plaintiff's attention.

The Administrative Procedure Act contemplates that the Court will review "all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action" only

"[t]o the extent necessary to decision and when presented." 5 U.S.C. § 706. Plaintiff's Second Amended Complaint does not allege facts or legal theories that relate to the issues raised for the first time in the Plaintiff's motion. None of these issues were pleaded, thus, these claims are not properly before the Court.

3) Martin's Motion for Summary Judgment on the Counterclaim

On September 7, 1995, Martin filed a Motion for Summary Judgment on the Counterclaim. The Counterclaim seeks an order "[a]pproving the [August 18, 1994, and December 27, 1994] orders of the arbitration panel in all respects and finding that the orders were not arbitrary, capricious, abuses of discretion and are otherwise in accordance with the law." Answer and Counterclaim of Defendant Jeana Martin to Plaintiff's First Amended Complaint, Prayer for Relief ¶ 1. For the reasons expressed above, and after reviewing the record of the arbitration proceedings, the Court finds that the orders of the arbitration panel were adequately supported by the evidence, and were not arbitrary, capricious, or an abuse of discretion. Accordingly, Martin's Motion for Summary Judgment on the Counterclaim is granted.

CONCLUSION

For the foregoing reasons the Court DENIES the Plaintiff's Motion for Disqualification of the Arbitration Panel, and Plaintiff's Motion for Summary Judgment, and GRANTS the Federal Defendants' Motion for Partial Summary Judgment, and Martin's Motion for Summary Judgment on the Counterclaim.

IT IS SO ORDERED.

Dated: Feb 6, 1996

/s/ JOHN G. DAVIES
JOHN G. DAVIES
United States District Judge

CV 95-546-JGD (CTx)

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APPENDIX C

PROCEEDINGS BEFORE AN ARBITRATION PANEL
PURSUANT TO THE RANDOLPH-SHEPPARD ACT,
20 U.S.C. 107d-l(a) and 20 U.S.C. 107d-2

In the Matter of the Arbitration
involving
JEANA MARTIN,
Complainant
and
CALIFORNIA STATE DEPARTMENT
OF REHABILITATION, BUSINESS
ENTERPRISE PROGRAM,
Respondent

Case No. R-S/92-13

DECISION OF THE ARBITRATION PANEL

APPEARANCES: Janice A. Jenkins, Esq., Yturbide & Jenkins, for Complainant, and James F. Ahern, Deputy Attorney General, State of California, for Respondent.

The Arbitration Panel: Robert R. Humphreys, Panel Member selected by Complainant; Joan Conroy Silverman, Panel Member selected by Respondent; and Edna E. J. Francis, Panel Chair, selected by Mr. Humphreys and Ms. Silverman

Hearing: Held before the Arbitration Panel on April 14 and April 15, 1994, at 1221 E. Dyer Road, Suite 265, Santa Ana, California. On April 14, 1994 the panel, the parties, and their representatives visited the Santa Ana General Mail Facility of the U. S. Postal Service to obtain first-hand information about its lunchroom site and vending locations.

BACKGROUND

This arbitration proceeding was convened by the U. S. Department of Education, pursuant to 20 USC §107d-1, to resolve a complaint for arbitration dated June 29, 1992 and a supplement to the complaint dated November 4, 1993, both filed by Jeana Martin, Complainant herein. ("Complainant" and "Ms. Martin" will be used interchangeably throughout the decision.) In summary, the complaint and the supplement to the complaint allege that Respondent (Department of Rehabilitation, Business Enterprise Program), a State licensing agency (hereinafter "SLA") under the Randolph-Sheppard Act (hereinafter "the Act"), failed to fulfill various statutory obligations imposed upon it by the Act as a result of its status and of its relationship with Ms. Martin, a blind licensee.

The objective and purposes of the Act, which is codified at 20 U.S.C. §§ 107 et seq, are expressed, as follows, in 20 U.S.C. §107:

> **§ 107. Operation of vending facilities**
>
> **(a) Authorization**
>
> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.
>
> **(b) Preference regulations; justification for limitation on operation**
>
> In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and

the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that—

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

The statutory role and obligations of a State licensing agency under the Randolph-Sheppard Act are set forth, in part, in §107b of the Act:

§107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree —

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;
(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: *Provided, however,* That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license issued: . . .
(3) . . .
(4) . . .
(5) . . .
(6) to provide any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

Section 107d-3 of the Act, referenced in 107, provides, in relevant part:

107d-3 Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; calling on amount for individual licensee

In accordance with the provisions of subsection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from

such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling than he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than

normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

(c) . . .
(d) . . .
(e) . . .
(f) . . .
(g) Regulations for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

The Act provides, as follows, for the filing of grievances by the blind licensee against the SLA or by the SLA against any agency of the United States, for alleged failure to comply with the provisions of the Act or with regulations promulgated under the Act:

§ 107d-1. Grievances of blind licensee
(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

> Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107B) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

In the context of at least the aforementioned, quoted provisions of the Act, and of applicable regulations, Complainant alleged that Respondent, in violation of the Act, failed to take any effective action in protecting Complainant's statutory priority under the Act to operate the vending locations on Federal property; failed to take timely effective action when, in mid-1989, the General Mail Facility (hereinafter "GMF") of the U. S. Postal Service in Santa Ana, California entered into an unlawful "break-even" contract with a commercial vending company encompassing the vending locations at the GMF; failed to take timely effective action to remodel Complainant's snack bar/lunchroom despite its recognition that remodeling was necessary to assure the effective conduct of her business; and terminated her license although Respondent's failures to protect Complainant's rights fostered the circumstances which led Respondent to terminate her license.

FACTUAL CONTEXT OF THE DISPUTE

The "Federal property" involved in this proceeding is the Santa Ana General Mail Facility (GMF) of the U. S. Postal Service, which was established in 1985 at 3101 W. Sunflower, Santa Ana, California. The facility comprises two floors with approximately 100,000 to 150,000 square feet of space. The facility, which processes mail bound for or sent from Orange County, California, operates twenty-four hours per day. At the times relevant to this complaint, approximately 1100 Postal employees worked at the facility during normal demand periods. During heavy periods, such as the Christmas season, the number of employees increased substantially.

From its inception, the GMF had a small snack bar/lunch room on the first floor, where employees could purchase food items, beverages, and snack items from vending machines and select a limited number of items, buffet-style, from a salad bar. In addition to the vending machines in the vicinity of the snack bar, throughout the facility, there were vending machines in break rooms, primarily on the first floor of the GMF, which offered beverages and snacks. Complainant, a blind licensee of Respondent, came to the facility in 1985 under the auspices of Respondent's Business Enterprise Program (hereinafter "BEP") and assumed control of the snack bar and 11 of 40 vending machines in the GMF. There had been one other vendor at the snack bar/lunchroom for a short period of time prior to Complainant's arrival. The vending locations not under Complainant's permit had already been let by the Postal Service to a private vendor prior to Complainant's arrival at the GMF.

From 1985 to 1989, Complainant built the vending facility at the GMF from a modest one generating $30,000 annual profit to one realizing, at its peak, an annual profit of $100,00. In addition, prior to October 1988, Ms. Martin received some income from some GMF vending machines which were located apart from her snack bar/lunchroom facility. By all accounts, except that of David Lyman, who was Plant Manager for the

facility "for seven or eight months in 1989 or 1990," Ms. Martin was a very good and creative vendor, labeled by her business counselor, as one of the best in the BEP.

Following up on an observation she had made even prior to coming to the GMF, that the set-up and physical scope of the snack bar were inadequate to offer optimal service, Ms. Martin requested remodeling and expansion of the facility in order to improve the service to her patrons. Patrons had been continually demanding more than Ms. Martin could offer, given the physical restraints of the facility itself. Both her business counselor, Richard Varvarinecz and the area supervisor for the BEP, John Westbrook, agreed that remodeling and expansion of service were necessary. In a memorandum dated August 10, 1989 to Mr. Flint, Assistant Chief, BEP, Mr. Westbrook expressed concern about the situation:

> Jeana Martin and I recently met with a group of post office managers at their request. The gist of the meeting was that they, and the postal employees as a whole, are very dissatisfied with our snack bar operation. They said they are getting constant complaints and their people are leaving the building for food service needs. They wanted to know what we could do to turn the situation around.
>
> It is apparent to me that, given the physical restraints of the facility itself, the postal employees want more than Jeana can provide. She is already pushing the stand's capabilities to its outer limits.
>
> I suggested that the only way to halt the criticism was to remodel the facility and in so doing expand the cooking facilities. I told them that we already had placed the snack bar on our remodel list and that with their help we could get the project underway soon. They stated that they would do whatever was required on their part and that they already have someone looking into expanding the snack bar facility.
>
> Since the meeting I have learned that the post office's "Quality of Life" committee has been working on a remodel

proposal for some time and that they are very anxious to meet with our architect.

I therefore request architectural (sic) services ASAP. This is a serious situation. If we do not act soon I am afraid that our vendor and our facility may be in jeopardy.

(Complainant's Exhibit L-3)

BEP officials continually promised Ms. Martin that renovation of the GMF snack bar facility was a top priority of the State's vending facility program. Mr. Westbrook so informed the Postal Service. By November 1989, Ms. Martin and the program's architect had collaborated and developed detailed plans for remodeling the facility. In November 1989, Mr. Edmon submitted the plans to the Postal Service for consideration. (Transcript, p. 30; Complainant's Exhibit L-S).

Meanwhile, Complainant, already experiencing decreasing patronage because of the inadequacy of the snack bar/ lunch room facility, was also experiencing adverse effects from the implementation of a "break-even" vending machine contract between the Postal Service and Canteen Corporation, the private vendor which operated vending locations at the GMF. As early as August 1986, BEP officials alerted Postal officials at the GMF facility of BEP's desire to participate in the bidding process when the vending machine contract for satellite operations within the GMF was open for bid. (Letter dated August 17, 1986 from Mr. Varvarinecz to Ms. Peggy Oliver - Complainant's Exhibit C-1). On March 8, 1988, Mr. Varvarinecz wrote again to the Postal Service, expressing BEP's belief that the vending machine contract would soon be up for bid and emphasizing BEP's desire to bid on the vending machines. In part, his letter, addressed to Ms. Levine in the Procurement Office, stated:

. . .

It would be our intent to assign the job duties and responsibilities of maintenance and stocking of these additional machines to Ms. Jeana Martin, who is currently employed by

our department as a cafeteria manager. We believe our manager would be in a much better position to provide service to these additional machines than what you may have experienced with a private contractor. In view of her work record as cafeteria manager and the fact that she currently maintains vending machines in the dining area I believe she would do a good job.

(Complainant's Exhibit C-4)

However, in 1989, without formal notice to BEP, the Postal Service began negotiations with Canteen Corporation to renew Canteen's contract for vending machine services at the GMF. Around August 1989, their negotiations culminated in a renewed contract between the Postal Service and Canteen regarding vending machine services at the GMF.

Shortly after the Postal Service renewed its contract with Canteen, Complainant called to Mr. Westbrook's attention what she regarded as unfair competitive practices by Canteen Corporation at the GMF. Mr. Westbrook, in turn, called the matter to the attention of Don Edmon, Interim Assistant Chief of Operations for BEP. In a memorandum dated September 11, 1989, wherein Mr. Westbrook also mentioned the urgent need to remodel the facility, Mr. Westbrook informed Mr. Edmon:

. . .

Another major concern that Ms. Martin and I have right now is the competitive vending machine contract. Canteen has a contract with the postal facility for approximately 16-20 machines in four employee break rooms (two of these rooms are adjacent to the cafeteria). These machines sell the same types of items that are sold through Jeana's machines. The contract with Canteen has just been re-negotiated. Rich Varvarinecz and I tried to get the Post Office to permit Ms. Martin to bid either as a blind vendor, or as an independent business person, but they refused on the grounds that they did not want to give Ms. Martin the machines and thus lose the competitive price control. They feel that under the permit they have no controls other than through competition.

> Last Friday Ms. Martin informed me that Canteen, under their new contract, has lowered its price on two major items: Coffee has gone from 25¢ to 10¢ and Pepsi from 30¢ to 15¢. Jeana cannot afford to lower her prices and they remain at 25¢ and 30¢ respectively. When Mr. Varvarinecz called the postal authorities to complain about the unfair competition he was told that it was the contracted price and that it would stand until the employees union negotiated a commission for itself, thus requiring Canteen to increase the prices.
>
> This morning I called Mr. Steve Leavey Mr. Leavey . . . is with the U. S. Postal Service in Washington, D. C. He is the liaison (representing postal employees) with regard to the Randolph-Sheppard Program. I explained the "unfair" competition that we were receiving from Canteen and I asked for his assistance. He asked for our post office liaison's name and number and promised that he would investigate and get back to me by tomorrow. I will relay any information that I get from him to you as soon as I get it.
>
> I understand that Ms. Martin has sought legal counsel from a source that is familiar with the Randolph-Sheppard Program and that she has been advised that she is entitled to all the machines in the building. I believe that the program should get a legal opinion and pursue this for her if this is the case.
>
> (Complainant's Exhibit E-l)

By letter dated October 6, 1989, Mr. Lam informed the manager of the GMF that the Postal Service was in violation of the Randolph-Sheppard Act:

> The Department of Rehabilitation, Business Enterprise Program would like your support in correcting an unacceptable violation of the Randolph-Sheppard Act at your facility. The blind vendor, Ms. Jeana Martin, has experienced more than

a fifty percent loss of income due to unfair and direct competition which started when your private vending machine was renewed September 1, 1989. Prices were immediately reduced in the private machines thereby reducing the volume of sales in the blind vendor's machines.

Further, the vending machine income owed to Ms. Martin has not been paid by your organization for the period of October 1988 through September 1989. The Department views the actions of your organization to be in violation of the letter and spirit of the Randolph-Sheppard Act (20 USC 107) and support federal regulations (34 CFR 395). We hereby request a meeting with you to immediately resolve this problem. Time is of the essence and unless the matter can be quickly resolved, the Department of Rehabilitation will be forced to pursue any and all remedial steps allowed by law. Your prompt attention and response is (sic) most appreciated.

(Complainant's Exhibit J-l)

By early 1990, the problem of vending machine competition still had not been resolved. In a letter dated April 12, 1990, Mr. Edmon, the Interim Administrator of BEP, informed the Department of Education (DOE) of the problem and requested their assistance:

. . .

In August of 1989, the postal facility (the Santa Ana GMF) implemented a new contract for vending food service at prices we feel create a break-even contract which has caused severe financial hardship to the blind vendor. The income to this vendor has been reduced by more than 60% since this contract started.

The postal facility failed to notify BEP when this contract was announced, in spite of a written request to notify BEP and allow us to bid.

. . .

> We are requesting your assistance in resolving this disagreement. If possible, we would be willing to meet, discuss, and resolve the problem without arbitration. If the postal facility is unwilling to do so, we would like to proceed with arbitration as soon as possible.
>
> (Complainant's Exhibit)

At the same time, BEP informed the Postal Service that the "break-even" nature of the contract between the Postal Service and Canteen had caused a severe financial hardship to the blind vendor and violated the Randolph-Sheppard Act, but that the BEP was willing to resolve the problem short of arbitration, if possible.

Relying upon the promises made to her by BEP representatives, Ms. Martin continually assured her patrons at the GMF snack bar that the facility would be renovated to produce a full-service cafeteria, and that, accordingly, service would be expanded to meet their demands, including the offering of hot foods and fried foods. However, Complainant's credibility and standing with patrons gradually eroded as the passage of time did not yield renovation or improve Complainant's ability to expand the menu, as BEP had promised Complainant. Patrons began to verbally abuse Complainant and to disparage Complainant and the manner in which the snack bar was operated. The disparagement increased with the patrons' discovery that the Canteen-operated vending machines at the GMF offered drinks and snacks at rates far below the reasonable rates at which Complainant offered them. For example, while Canteen charged 10 cents for a cup of coffee, Complainant was compelled to charge 25 cents in order to make a profit. While Canteen charged only 15 cents for Pepsi, Complainant was unable to charge less than 30 cents. Postal employees began to verbally abuse Complainant, referring to her a "price gouger." Many stopped patronizing the snack bar and used it only as a place to eat food purchased

elsewhere or brought from home. As a result of the loss of credibility and the consequent loss of patronage, Complainant's operation began to lose money at an accelerating rate.

In April 1990, Complainant filed a complaint against Respondent, alleging that Respondent was not fulfilling its obligations to her under the Randolph Sheppard Act. In May 1990, Mr. Ladas, the Deputy Director, Program Management and Support for BEP, responded to her grievance and agreed with that portion of it which alleged that the vending service contract between the Postal Service and Canteen was a "break-even contract" and that it had seriously hurt her income. However, Mr. Ladas found no basis for granting an administrative remedy. (Complainant's Exhibit D). Complainant filed an appeal of that decision with the Rehabilitation Appeals Board. (In March 1991, the Appeals Board found that appellant had suffered a significant loss of income as a result of the "break-even" contract, that BEP, without success, had taken steps to correct the problem, and that although BEP could have acted more aggressively on Complainant's behalf, it had justifiably demurred lest it jeopardize its good relations with the Postal Service and thereby adversely affect the interests of other blind vendors in the State. Complainant continued the appeal process regarding the complaint and it eventuated in the instant proceeding.)

On October 12, 1990, BEP filed a request for arbitration against the U. S. Postal Service, seeking cancellation of the "break-even" contract at the GMF, elimination of direct competition pricing with the BEP-licensed vendor there, and payment to the vendor of 100% of the income derived therefrom. However, prior to the pre-hearing conference, which was scheduled for September 24, 1991, BEP and the Postal Service settled the underlying dispute. Among the terms of the settlement, they agreed, that from the date of the signing of the agreement until the date of expiration of the contract with Canteen, the SLA would be entitled to 100% of the income from two vending locations in the vicinity of the lunchroom and

30% of the income from two vending locations along a wall opposite the lunchroom; that the Postal Service would not renew its contract with Canteen upon its expiration on July 31, 1992; that prior to that date, SLA would submit a permit application for the two vending locations in close proximity to the lunchroom, which application would be approved with an effective date of August 1, 1992 (portions, prices and variety of items to be subject to negotiation between the Postal Service and SLA); that prior to July 31, 1992, the SLA would submit a solicitation for the two additional vending locations on the opposite wall from the lunchroom and if selected as the operator, would enter into a standard food service contract and pay a commission to the Postal Service as would a private concessionaire; that if SLA were not selected as the concessionaire for those two locations, the Postal Service would share 40 percent of any commissions it received under the contract; that the Postal Service would meet and negotiate with SLA regarding the operation of any new vending locations added to the GMF; and that the Postal Service would make no back payments to Ms. Martin or to the SLA in connection with the dispute being settled by the settlement agreement. (Complainant's Exhibit H).

After the Department's settlement of its complaint against the Postal Service, Complainant continued to operate the lunchroom, with the same level of expenses and a decreasing level of income. As of the date of BEP's settlement of its arbitration complaint against the Postal Service, physical improvements to the snack bar/lunchroom facility had not begun, although blueprints for the remodeling had been produced as early as April 1990. Canteen continued with its "break-even" prices in the vending locations it operated, and neither Complainant nor the SLA received any income from the vending machines in those locations. Patrons continued to verbally abuse Complainant, to regard her as a "price gouger," to doubt her credibility because the remodeling had not taken place as she promised, and to shun the lunchroom. Complainant began to fall behind in the financial obligations of the

business, and tried to make ends meet by borrowing money from one account to pay another. She exhausted her life savings of $75,000, forced to use the money both for living expenses and business expenses. Without adequate income from her business, she fell behind in her sales tax obligations to the State of California. By August 1991, Complainant decided that the hostile business atmosphere at the GMF left her no choice except to leave the GMF. With the encouragement of the BEP, she relocated to three additional locations in Southern California after she left the GMF. However, none of the locations produced sufficient income to allow Complainant to satisfy or substantially reduce the snowballing financial obligations which followed her from the GMF. The amount owed for sales tax grew quickly to an insurmountable debt because of the continuous addition of interest and hefty penalties.

By letter dated June 25, 1992, BEP notified Complainant that her license to operate as a blind vendor would be terminated effective July 10, 1992 because of Complainant's failure to satisfy financial obligations to the State Board of Equalization and to the BEP. Complainant appealed the decision and requested a fair hearing before the Rehabilitation Appeals Board. Final decision regarding termination of the license was stayed pending completion of the appeals process. A hearing was scheduled to be held on July 27, 1992 in Sacramento, California. Complainant traveled to Sacramento to attend the hearing, but fell seriously ill and was unable to attend the hearing. Within a day or so of the hearing, she was hospitalized at U. C. Davis and underwent surgery for an aneurysm. At the conclusion of the appeals process, BEP followed through with its decision to revoke her license to operate as a blind vendor. As of the date of the hearing, the license had not been reinstated. Complainant has not been employed since the loss of her license and has no assets from which existing sales tax obligations or other business debts may be satisfied. Further, even if her license as a blind vendor is reinstated and she resumes control of a blind vendor facility, the State Board of

Equalization will install a keeper and assume control of her receipts until her past due sales tax obligations to the State of California have been satisfied.

DISCUSSION AND OPINION

Upon the complaint and supplement to the complaint, the evidence adduced at the hearing, the documentary evidence submitted by the parties, the post-hearing briefs of the parties, and the entire record herein, the Arbitration Panel finds that Respondent violated the letter and spirit of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act"), as set forth below, in its relationship with Complainant. The testimony and documentary evidence establish the validity of the Complainant's claims against Respondent. Respondent failed to protect the program or uphold the law as it was bound to do under the assurances it gave the Secretary of Education in exchange for its designation as a State Licensing Agency ("SLA") pursuant to the Act.

In broad terms, the State violated the spirit and letter of the Act by failing to protect the priority accorded blind vending facilities under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which the blind vendors were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; and finally, by terminating without sufficient foundation Complainant's license and her means of self-support. Those failures, taken together, represent a substantial violation of the State's assurances to the Department of Education. Together, they also represent an abrogation of the State's duty to a particular blind vendor, Complainant, and a continuing neglect of the blind vendors and the program which supports them.

The Panel rejects Respondent's argument, in effect, that the SLA's only responsibility to a blind vendor is to help the

vendor establish the business. In fact, the SLA's responsibilities under the Act and the regulations which implement the Act are many and varied. For example, the SLA has full responsibility for the supervision and management of each vending facility. See 34 CFR §§ 395.3(a)(4), (5), (7), (8), and (11)(ii). Section 395.10 of the regulations requires the SLA to maintain all vending equipment in good repair and in an effective condition " . . . to ensure the continued successful operation of the facility." Section 395.11 requires the State to ensure that each blind vendor's maximum vocational potential is achieved.

Because only the State may bring an arbitration complaint against a Federal department, agency or instrumentality for violations of the Act and regulations, the State must act as both surrogate agent and protector of the blind vendor against the wrongs of a Federal department, agency or instrumentality – in this case, the Postal Service. Accordingly, in this case, the SLA had an obligation to ensure that the Postal Service observed the Act so that Complainant, in accordance with the intent of the Act, would be the beneficiary of its provisions.

Section 107d-3(a) of the Act states, in part, ". . . vending machine income obtained from the operation of vending machines on Federal property shall accrue . . . to the blind licensee operating a vending facility on such property . . ." The subsection further provides that no limitation may be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced or operated by a blind licensee. Subsection (b)(l) of Section 107d-3 states that the term "direct competition" means the existence of any vending machines or facilities operated on the same premises as a blind vending facility and that if direct competition exists the resident blind vendor is entitled to 100 percent of all income from vending machines on the property.

Notwithstanding the provisions of Section 107d-3, the record reflects that Complainant received income only from the vending machines which where physically located within her snack bar/lunchroom. Based upon documentation in the record

and information gleaned from the Arbitration Panel's site visit to the GMF, it is apparent that Complainant should have received 100 percent of the income from all four of the so-called "satellite" vending machine alcoves on the first floor of the GMF. Unquestionably, they were in direct competition with Complainant. Arguably, she also should have received income from the machines on the second floor of GMF. Although the SLA at one point asserted that Complainant was entitled to income at the same rate with respect to all machines at the GMF, it unjustifiably retreated from that position when the Postal Service opposed that position.

Furthermore, the State clearly knew, as early as 1986 of the existence of the Canteen contract, and that it would expire in 1988 or 1989. (*See*, for example, Complainant's Exhibit C-1, August 26, 1986 letter from Mr. Varvarinecz to Ms. Oliver, USPS, noting that the satellite vending contract would soon be open for bid; Complainant's Exhibit C-2, January 19, 1987 letter from Mr. Varvarinecz to Karen Kim, USPS, similar expression; Complainant's Exhibit C-3, August 4, 1987 letter from Mr. Flint, Assistant Administrator of the State BEP Program to Larry Anderson, USPS, suggesting that a sole source permit for the satellite vending machines be assigned to Jeana Martin; Complainant's Exhibit C-4, March 9, 1988 letter from Mr. Varvarinecz to Ms. Levine again noting the expiration of the vending contract and asking that the machines be serviced by Ms. Martin.) Thus, the fact that the Postal Service did not formally notify the SLA that the contract was expiring does not excuse the SLA's failure to timely and forcefully intervene on Complainant's behalf. It had sufficient information at its disposal to protect and enforce Complainant's rights regarding the vending locations operated by Canteen. Pursuant to Section 395.32(h) of the regulations, SLA should have insisted upon Complainant's right to receive income from the vending locations. Section 395.32(h) of the regulations states:

> All arrangements pertaining to the operation of vending machines on Federal property not covered by contract,

> with or by permits issued to, a State licensing agency, shall be renegotiated upon the expiration of the existing contract or other arrangement for consistency with the provisions of this section.

The State's acceptance of a position as supplicant to the Postal Service is not defensible, given the provisions of the Act. The SLA should have demanded — not requested — that all income from the vending machines be assigned to Complainant, and to the program. It had an obligation to make such a demand, and to continue through arbitration and litigation, if necessary, to insist that the Postal Service turn over vending machine income to the BEP. While Federal property managing agencies have affirmative obligations under the Act, States also have obligations. When a Federal agency impedes the blind vending program or violates the Act, as the Postal Service did here, the State must fill the void and assert its role as protector of its vendors. In this case, the State failed to meet its very clear obligations in that regard.

Little attention can be seriously paid to Respondent's assertion in its post-hearing brief that the renegotiated vending contract between the Postal Service and Canteen Corporation is not a "break-even" contract. The assertion is belied by numerous pieces of correspondence in the evidentiary record which show that the State recognized the contract negotiation to be for a "break-even" situation, with a 4% fee to be provided to the Postal Service for the GMF's employees' recreation association. (*See*, for example, letters and memoranda in the record from Don Edmon, Hao Lam, and John Westbrook. Complainant's Exhibits C-5, E-1, G, J-1, and L-5.) The State also had the benefit of valuable, on-point precedent in the 1981 San Francisco arbitration case involving the Department of Rehabilitation against the Postal Service, wherein the Arbitration Panel found that "[t]he break-even policy is generally inconsistent with the intent of the Act." (Complainant's Exhibit K, p. 15). That decision is of great weight, if not binding, in

determining the responsibility of both the U. S. Postal Service and the State Licensing Agency.

The denigration of Complainant's ability, responsibility, and professionalism by Respondent, through its counsel, is wholly unjustified. Such a position on Respondent's part during the course of the hearing and thereafter is diametrically at odds with record statements of Respondent's own officers — those who are arguably in the best position to know about Complainant's performance as a vendor and the quality of her operation. John Westbrook, the Supervisory Business Enterprise Counselor, referred to Ms. Martin as "one of our more successful vendors" and "one of our best vendors." (Complainant's Exhibit E-1). Comprehensive evaluation reports on Ms. Martin's operation in 1988 and 1990 unwaveringly characterized Complainant and her vending facility as "excellent," "exceptional," and "responsible." The overall comment in BEP's 1990 evaluation of Complainant — which encompassed the period during which Postal employees and management allegedly registered strong dissatisfaction regarding Complainant and the condition of her facility — sums up the Department's impressions of Ms. Martin, and bears repetition here: "Jeana has proven to be an exceptional BEP vendor. She is operating a very difficult location and she had made many improvements that have been appreciated by customers and building management alike. Jeana should have no problem running any BEP location." (Complainant's Exhibit E-4, at page 3). The Panel finds BEP's contemporaneous evaluation reports of Complainant and the facility more credible than the generalized criticisms Mr. Lyman offered during his testimony and Mr. Deapen made in his declaration. Further, there is no evidence that the Postal Service ever documented and called to the attention of Complainant any specific complaints regarding quality control or sanitation matters regarding the snack bar. The evaluation reports just cited state, in part, "Jeana is a responsible manager and vendor. She has a very good sanitation record and pays attention to the details of supervising employees who prepare

and handle food." (Complainant's Exhibit E-3, at page 2); "Jeana has always passed sanitation inspection with little or no difficulty. She does a very good job in this area because she knows the value of good sanitation and what it means to customers." (Complainant's Exhibit E-4, at page 2).

BEP officials who were personally familiar with the snack bar/lunchroom at GMF recognized quite clearly the connection between Postal employee dissatisfaction and frustration and the failure of the State to remodel Complainant's vending facility into a full-service cafeteria. In a memorandum to James Flint, Assistant Chief, BEP, John Westbrook stated: "It is apparent to me that, given the physical restraints of the facility itself, the Postal employees want more than Jeana can provide. She is already pushing the stand's capabilities to its outer limits." (Memorandum dated August 10, 1989, Complainant's Exhibit L-3). On the very same day, Mr. Westbrook wrote to the Human Resources Director of the GMF facility assuring him that "we are prepared to spend a large sum of money to remodel this facility — in fact, I would hope that the new facility could be a model for future BEP postal facilities." (Letter from J. Westbrook to J. Burns, August 10, 1989). Despite the SLA's recognition of the urgent need to remodel the facility, in the final analysis, it failed both Ms. Martin and other beneficiaries of the blind vending program. (*See* 34 CFR §§ 395.3, 395.10, and 395.11). The inordinate delay in remodeling the facility substantially contributed to Complainant's loss of income from the snack bar/lunchroom facility.

Further, the existence/continuation of Canteen's illegal "break-even" contract with the Postal Service also substantially contributed to Complainant's loss of business and income at the GMF. Although the SLA was the only agency with legal standing to challenge the Postal Service's violations of the Randolph-Sheppard Act, it withdrew its challenge despite being urged to pursue it to various levels, despite its knowledge that failure to do so would be deeply injurious to Complainant, and despite the fact that the settlement with the Postal Service was

against public policy because it was contrary to the Act and its intent. Contrary to the justification it offered for failing to formally challenge the Postal Service earlier than October 1990, the SLA was without authority to compromise Complainant's rights under the Act on the theory that enforcement of her rights may antagonize the Postal Service and jeopardize present and future BEP opportunities with the Postal Service.

In summary, Complainant's misfortunes flowed directly from the SLA's failure to insist on prompt renovation of the vending facility, its failure to insist on assignment of all vending machine income to her, and its failure to take immediate formal action to void the illegal "break-even" contract between the Postal Service and Canteen Corporation. Compounding its failures, the Department of Rehabilitation wrongly shifted from itself to Complainant the blame for her misfortunes and, as a result of those misfortunes, terminated her license — following a hearing at which Complainant, for good cause, was unable to appear.

AWARD RE LIABILITY

Respondent violated the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act") in its relationship with Complainant by failing to protect the priority accorded Complainant in her capacity as a blind vendor under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which it and Complainant were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; by failing to expeditiously act to ensure prompt renovation of the snack bar\lunch room; and finally, by terminating, without sufficient foundation, Complainant's license as a blind vendor and, thus, her means of self-support.

The Arbitration Panel hereby orders the parties to submit briefs (postmarked on or before September 7, 1994), together with any additional evidence pertinent to the issue of remedy, addressing the appropriate remedy or remedies to be awarded by the Arbitration Panel."

Date: August 18, 1994

/s/ Edna E. J. Francis
Edna E. J. Francis
Chair, Arbitration Panel

Panel Member Humphreys concurs with the decision. Panel Member Silverman dissents from the decision.

PROOF OF SERVICE BY MAIL

I declare as follows:

I, the undersigned, am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is P. O. Box 65556, Los Angeles, California 90065.

On August 19, 1994, I served the within DECISION OF THE ARBITRATION PANEL - CASE NO. R-S/92-13 (dated August 18, 1994) on the individuals identified by name and address immediately below by causing a true copy of the DECISION to be placed in a sealed envelope and thereafter sent by certified mail, return receipt requested, with appropriate postage affixed, to each of the named individuals, as indicated below:

Robert R. Humphreys, Esq.
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George F. Arsnow, Chief
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Washington, D. C. 20202

I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Edna E. J. Francis
Edna E. J. Francis

APPENDIX D

PROCEEDINGS BEFORE AN ARBITRATION PANEL
PURSUANT TO THE RANDOLPH-SHEPPARD ACT,
20 U.S.C. 107d-l(a) and 20 U.S.C. 107d-2

In the Matter of the Arbitration
involving
JEANA MARTIN,
Complainant
and
CALIFORNIA STATE DEPARTMENT
OF REHABILITATION, BUSINESS
ENTERPRISE PROGRAM,
Respondent

Case No. R-S/92-13

DECISION OF THE ARBITRATION PANEL
(Remedy Only)

APPEARANCES: Janice A. Jenkins, Esq., Yturbide & Jenkins, for Complainant, and James F. Ahern, Deputy Attorney General, State of California, for Respondent.

The Arbitration Panel: Robert R. Humphreys, Panel Member selected by Complainant; Joan Conroy Silverman, Panel Member selected by Respondent; and Edna E. J. Francis, Panel Chair, selected by Mr. Humphreys and Ms. Silverman

Hearing: Held before the Arbitration Panel on April 14 and April 15, 1994, at 1221 E. Dyer Road, Suite 265, Santa Ana, California. On April 14, 1994 the panel, the parties, and their representatives visited the Santa Ana General Mail Facility of the U. S. Postal Service to obtain first-hand information about its lunchroom site and vending locations. Subsequently, the issues regarding appropriate remedy, primarily reserved to the second half of this bifurcated proceeding, were addressed through documentary evidence and briefs from both parties.

BACKGROUND

On August 18, 1994, Arbitration Panel Chair Francis issued the following award, in which Panel Member Humphreys concurred, finding that Respondent had violated the Randolph-Sheppard Act, 20 USC §§107-107e (hereinafter "the Act") in a number of respects:

> Respondent violated the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act") in its relationship with Complainant by failing to protect the priority accorded Complainant in her capacity as a blind vendor under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which it and Complainant were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; by failing to expeditiously act to ensure prompt renovation of the snack bar/lunch room; and finally, by terminating, without sufficient foundation, Complainant's license as a blind vendor and, thus, her means of self-support.

Having determined that Responden is liable to Complainant, Jeana Martin, the Arbitration Panel, incorporating its prior award regarding liability, now makes the following award regarding remedy.

FINDINGS

The Arbitration Panel finds that the foregoing violations by Respondent, which led to Complainant's economic collapse, are fully compensable. Because Respondent's acts and omissions proximately and directly caused extensive economic injury to Complainant, Complainant is entitled to an award encompassing all losses traceable to those acts and omissions. Further, the award requires, to the extent such restoration can

be effectuated, the restoration of Complainant to the economic position and the employment status she enjoyed prior to the time Respondent violated the Act and Complainant's rights. The Panel's award regarding remedy includes compensation for loss of income from competing vending machines during Complainant's tenure at the General Mail Facility (GMF); loss of income occasioned by the break-even contract between the U. S. Postal Service (USPS) and Canteen Corporation; loss of income due to Respondent's failure to remodel; loss of income due to the termination of Complainant's blind vendor license to operate a vending facility; attorney's fees and costs; restoration of Complainant's license, including her seniority status; and assignment of Complainant to a vending facility acceptable to her, which is comparable in income potential to the Santa Ana GMF.

The elements taken into consideration by the Panel in making this award, and the remedial amounts decided upon, are as follows:

1. Reduction of Complainant's net income from her own vending machines attributable to the existence of the break-even contract between the USPS and Canteen Corporation, from the date the break-even contract took effect (July 31, 1989) until the date Complainant's tenure at the GMF was terminated (August 1991). The amount in this category, although real, is speculative. The Panel believes that its award under Item 2, immediately below, adequately covers Complainant's loss occasioned by the "satellite" vending machines because it provides an amount reflecting the low range of income she would have realized from those machines if she had operated them (like her successor, Patricia Evans, who now operates the machines).

2. Income from four "satellite" vending machine alcoves on the first floor of the GMF, from June 16, 1985 (the inception of Complainant's facility operation) until August 1991, when the Complainant's facility operation terminated. Based upon the records furnished by Complainant's attorney, and the declara-

tion of Patricia Evans, the satellite alcove machines have provided a minimum of $4,000 per month, and as much as $6,000 per month, of additional income to the vending facility — income which should have accrued to Complainant during her tenure at the GMF. In order to do justice, and at the same time not speculate on an exact amount, the Panel awards Complainant the minimum amount of $4,000 per month for the period of her stewardship at the GMF, or a total of $300,000 (75 months x $4,000).

3. An amount representing the cost in income to Complainant of the delay, from May 1990, the date Respondent formally notified Complainant that it would not remodel the snack bar/lunch room facility at the GMF, until August 1991, when Complainant left the facility. Although the Complainant argues strenuously that the *entire period* of her GMF operation should be counted toward the cost to her of Respondent's failure to renovate, the Panel must limit its award to that period encompassing the date Respondent "went on record" with its refusal to remodel (May 1990) and the date Complainant left the GMF (August 1991). Such calculation is a reasonable measure of damage to Complainant regarding this element. Accordingly, the Panel awards a total of $35,971.65 for this element, based upon the following calculation: $14,534 (monthly difference between pre-remodeling and post-remodeling non-machine gross receipts reported by Ms. Evans) x 16.5% (non-machine net profit reported by Ms. Evans) x 15 months = $35,971.65.

4. An amount reasonably calculated to make Complainant whole for the period from April 16, 1993, when her license was terminated by the State, until the date of this award, December 27, 1994. Although it could be argued that Complainant is entitled to the average amount of income she generated over the last several years she operated as a vendor, the Panel, in order to avoid speculation, awards Complainant an amount which corresponds to the average net income of blind vendors in the United States, according to FY 1993 report, the most recent calculation available to the Panel. Therefore, the Panel awards

a total of $43,053.40 (Average annual net income of $25,832 divided by 12 = $2,152.67 x 20 months = $$43,053.40).

5. The amount of reasonable attorney's fees, costs, and expenses incurred by Complainant in prosecuting her rights under the Act, beginning with fees and expenses related to the filing of her grievance with the State on April 24, 1990, up to and including those fees and expenses incurred as of the date of this award. In that regard, the declaration of Complainant's attorney, Janice Jenkins, with its attached time sheets and a list of expenses, appears to reflect a reasonable hourly rate and a reasonable total. The Panel, therefore, awards Complainant her attorney's fees in the amount of $68,977.00 and expenses in the amount of $1,921.65, for a total of $70,898.65.

AWARD RE REMEDY

The Arbitration Panel hereby awards monetary compensation, including damages, restitution, and fees and expenses, in the amount of $449,923.70. Respondent is directed to pay the foregoing amount to Complainant within 30 days following the date of this award. Interest as determined in accordance with California law for the payment of damage judgments by the State shall apply to any amounts not so paid.

The Arbitration Panel further directs Respondent to reinstate Complainant's blind vendor license and to place her forthwith in a vending facility comparable to the General Mail Facility at Santa Ana, California. In the event no such comparable facility is immediately available, Respondent is directed to pay compensation to Complainant each month, beginning January 1995, in an amount equivalent to the net income Complainant would have received had she been placed in such a facility. Based upon the submissions in the record in this proceeding, such monthly amount payable shall be S5,731.94.

The Arbitration Panel shall retain jurisdiction of this case for 90 days following the date of this award for the purpose of receiving any motion, information, or other matter related tothe effectuation of the Panel's decision and award.

Dated: December 27, 1994

/s/ Edna E. J. Francis
Edna E. J. Francis
Chair, Arbitration Panel

Panel Member Humphreys concurs with the award in its entirety. Panel Member Silverman concurs only with those remedies ordering payment of attorney's fees and expenses, reinstatement of Complainant's blind vendor license, and reinstatement of Complainant to a vending facility comparable to the GMF, and dissents from the award of monetary compensation for damages.

PROOF OF SERVICE BY MAIL

I declare as follows:

I, the undersigned, am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is P.O. Box 65556, Los Angeles, California 90065.

On December 27, 1994, I served the within DECISION OF THE ARBITRATION PANEL (REMEDY ONLY), dated December 27, 1994, re CASE NO. R-S/92-13, on the individuals identified by name and address immediately below by causing a true copy of the DECISION to be placed in a sealed envelope and thereafter sent by certified mail, return receipt requested, with appropriate postage affixed, to each of the named individuals, as indicated below:

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I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Edna E.J. Francis
Edna E.J. Francis

FILED
NOV 7 1997
CLERK

No. 97-641

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Petitioner,

v.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATE'S DEPARTMENT OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, LOUISIANA, MARYLAND, MICHIGAN, OKLAHOMA, AND VERMONT SUPPORTING PETITIONERS

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No. 97-641

IN THE
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OCTOBER TERM, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Petitioner,

v.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATE'S DEPARTMENT OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, LOUISIANA, MARYLAND, MICHIGAN, OKLAHOMA, AND VERMONT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Does the Randolph Sheppard Act explicitly authorize an arbitration panel to order a State to pay a blind vendor compensatory damages and attorneys fees?

2. Does a State waive its Eleventh Amendment immunity by applying to be designated a State licensing agency under the Randolph Sheppard Act?

INTEREST OF THE AMICI CURIAE

Each of the Amici Curiae States voluntarily participates in the federal-state cooperative program created by the Randolph Sheppard Act, 20 U.S.C. §§ 107-107f (the "Act"). The purpose of the Act is to assist blind persons in obtaining gainful employment. If the decision of the Ninth Circuit below is left standing, amici must review their participation in the program and possibly withdraw from it. Being subject to large compensatory damage actions in federal court was not part of the bargain Amici agreed to when they joined this Spending Clause program.

The Act gives blind persons licensed by State licensing agencies priority to operate vending facilities on federal property. Disagreements between States and blind vendors are decided through an arbitration panel. The court of appeals held that an arbitration panel can order a State to pay compensatory damages and the blind vendor can have that decision enforced in federal court.

The Amici States have agencies which are designated by the U.S. Department of Education as State licensing agencies under the Act. This authorizes those States to license blind vendors and place them at vending facilities on federal properties. The authorization is intended to increase employment opportunities for people who are blind and visually impaired. It is not intended to create large compensatory damage liabilities against States.

Moreover, Congress has passed numerous other laws under its Spending Clause power creating federal-state cooperative programs. States will hesitate to participate in those programs -- which benefit millions of people -- if federal courts continue to subject States to liability under them where there is no express statutory authorization. The decision below disregards established rules of statutory construction to ensure that when the federal government imposes obligations on the States it does so with the utmost clarity.

REASONS FOR GRANTING THE PETITION

I. A COMPENSATORY DAMAGE AWARD AGAINST A STATE IN FEDERAL COURT UNDER THE RANDOLPH SHEPPARD ACT WHICH CREATES A FEDERAL-STATE COOPERATIVE PROGRAM UNDER THE SPENDING CLAUSE OF THE CONSTITUTION IS AN IMPORTANT MATTER AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Decision Below Erroneously Subjects The States To Large Compensatory Damage Awards Under A Spending Clause Program That Does Not Expressly Impose Such Liability On The States.

"(T)he possibility of large monetary liability for unintended [violations of federal law] might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes." *Guardians Ass'n. v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 602 (1983) (White, J. joined by Rehnquist, J.). This Court has developed specific rules of statutory construction to encourage States to participate in federal-state cooperative programs authorized by the Spending Clause of the Constitution. The court of appeals below misinterpreted these rules thereby erroneously subjecting States to large damage claims under the Act.

If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Pennhurst State Sch. & Hospital v. Halderman,* 451 U.S. 1 (1981). "Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 U.S. at 17. Make whole remedies are not ordinarily available in private actions seeking relief for violations of federal statutes

passed pursuant to the Spending Clause placing conditions on the grant of federal funds. *Guardians Ass'n.*, 463 U.S. at 597.

The language of the Randolph Sheppard Act does not explicitly authorize compensatory damages and attorneys fees against a State. It creates a federal-state cooperative program pursuant to the Spending Clause. Under the Act blind people licensed by States are given priority to operate vending facilities on federal properties. A state applies to be designated as a State licensing agency by the United States Department of Education. 34 C.F.R. § 395.2. If designated, the State licensing agency submits a permit including the terms and conditions of operating a facility to a federal property manager. 34 C.F.R. § 395.16. If the federal department approves the permit, it is issued to the State agency. Among other requirements, the State agency places a licensed blind vendor at the vending stand on the federal property. 34 C.F.R. §§ 395.34, 395.35, and 395.7. The State collects set-aside funds from the blind vendors operating within the State to administer the program. 34 C.F.R. §§ 395.9 and 395.1(s).

Disputes between a State licensing agency and a blind vendor are subject to arbitration. Title 20 U.S.C. § 107d-1(a) states, "...the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." Title 20 U.S.C. § 107d-2(a) states, "Such panel shall, in accordance with the provisions of subchapter II, of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." These are the only sections of the Act which describe the remedies which may be imposed against a State. In this case, the Ninth Circuit upheld an arbitration panel's order that California pay a blind vendor almost $380,000 in compensatory damages, about $5700 per month in future earnings, and over $70,000 in attorneys fees.

The words "the decision ... shall be final and binding" and "final agency action" do not unambiguously or explicitly authorize an arbitration panel to require a State to pay compensatory damages or attorneys fees to a blind vendor. These words do not, in any way, mention damages. Accordingly, an arbitration panel under the Act has no authority to require a State to pay compensatory damages to a dissatisfied blind vendor.

This conclusion is supported by the Act's reference to the Administrative Procedures Act ("APA") in 20 U.S.C. § 107d-2(a). The APA gives a right of review to United States court to a party seeking relief, "other than money damages." *Lane v. Pena,* ___ U.S. ___, 116 S.Ct. 2092, 2098 (1996). These words of the APA demonstrate that no money damages were explicitly authorized by the Act.

In this one case alone, California's participation in the Act resulted in a $450,000 judgment against it. Other plaintiffs in States across the nation are sure to follow Respondent Martin's lead. The Ninth Circuit's reading of the Act has thus opened the door to significant damages actions against the States under a statute that says nothing about the imposition of damages. The Ninth Circuit's decision changes the "contract" the States entered into when they agreed to participate in the Act and threatens to re-write the contracts States made when entering into various other Spending Clause programs. *See, e.g.*, Block Grants for Temporary Assistance for Needy Families of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, Title I, §§ 101-116, 110 Stat. 2110-2185, the Developmentally Disabled Assistance and Bill of Rights Act, as amended, 42 U.S.C. § 6000-6083, the Individuals with Disabilities Education Act, 42 U.S.C. §§ 1400-1486, and the grant to assist in administering state unemployment compensation law, 42 U.S.C. §§ 501-504.

In conclusion, the decision of the Ninth Circuit Court of Appeals violates the specific rules of construction applicable to statutes which create federal-state cooperative programs under the Spending Clause. It will discourage States from participating in these programs because a State will not know all of its obligations before taking part in the program.

B. The Decision Of The Ninth Circuit Court of Appeals Conflicts With The Decisions of Other Courts Of Appeals.

The decision of the Court of Appeals for the Ninth Circuit requiring a State to pay compensatory damages and attorneys fees is consistent with two other circuits and conflicts with others. The Courts of Appeals for the Third and Sixth Circuits held that the Act authorizes a panel to award compensatory damages against a State. *Delaware Dept. of Health v. United States Dept. of Education,* 772 F.2d 1123 (3d Cir. 1985) [arbitration panel may award attorneys fees, also]; *Tennessee Dept. of Human Services v. U.S. Dept. of Education,* 979 F.2d 1162 (6th Cir. 1992). In contrast, two other courts of appeals held that no compensatory damages were authorized under the Act. *McNabb v. U.S. Dept. of Education,* 862 F.2d 681 (8th Cir. 1988) *cert. denied, sub nom. McNabb v. Georgia,* 493 U.S. 811 (1989); *Georgia Department of Human Resources v. Nash,* 915 F.2d 1482 (11th Cir. 1990).[1]

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[1] The Act creates an arbitration procedure for resolving disputes between States and the federal government, also. The words of the Act creating the remedy in an arbitration proceeding between a blind vendor and a State are the same as the words creating the remedy between a State and the federal government. Compare 20 U.S.C. § 107d-1(a) with § 107d-1(b). Also, 20 U.S.C. § 107d-2(a) governs both procedures. The courts of appeals are split on whether a remedy is available in disputes between a State and the federal government. Two courts of appeals and one district court have concluded no remedy is available. *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs,* 98 F.3d 165 (4th Cir. 1996) (continued...)

If the Court construes the Act to not authorize an award of compensatory damages and attorneys fees against a State, then the constitutional issue discussed below need not be decided. See *U.S. v. Clark*, 445 U.S. 23 (1980). If the court decides the Act does create such a remedy, then the Eleventh Amendment immunity issue, below, is presented.

II. WHETHER STATES WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY BEING DESIGNATED AS STATE LICENSING AGENCIES IS AN IMPORTANT MATTER AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Act Does Not Manifest A Clear Intent To Condition Participation In The Program On A State's Waiver Of Eleventh Amendment Immunity.

The Eleventh Amendment protects a State from being sued in federal court. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139 (1993). "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (cite omitted) 506 U.S. at 146.

In light of these considerations, Spending Clause statutes must manifest a clear intent to condition participation

---

[1](...continued)
cert. den. Docket No. 96-1550 and 1551, October 6, 1997. *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990); *U.S. v. Mississippi Vocational Rehabilitation for the Blind*, 794 F.Supp. 1344, *amended*, 812 F.Supp. 85 (S.D.Ms. 1992). In contrast, the District of Columbia circuit ruled that an arbitration panel may order a remedy when it decides a federal agency violated the Act. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). The eighth circuit court of appeals affirmed an order requiring a federal agency to follow the permit procedure under the Act. *Minnesota Dept. of Economic Security v. Riley*, 18 F. 3d 606 (8th Cir. 1994).

in the program on a State's waiver of Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 246-247, n. 5 (1985). Waiver of Eleventh Amendment immunity is found only where express language or overwhelming implications from the text leave no room for any other reasonable construction. *Edelman v. Jordan*, 415 U.S. 651 (1974). For example, a general statement to obey federal law does not waive a State's Eleventh Amendment immunity. *Florida Dept. of Hlth. v. Florida Nursing Home,* 450 U.S. 933, (1981).

The law most similar to the Randolph Sheppard Act is Section 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. §§ 794 and 794a). At the time *Atascadero* was before this Court the Rehabilitation Act included numerous references to the States. Those references to the States did not manifest a clear intent to condition participation in the funded program on a State's consent to waive Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985).

In this case, 20 U.S.C. § 107d-1(a) says the State licensing agency shall provide a full evidentiary hearing upon the request of a blind vendor. Title 20 U.S.C. § 107d-2(b)(1) says the State licensing agency shall appoint one member of the arbitration panel and the chairman of the panel shall not be an employee of the State licensing agency. Those are the only references to the State in the two sections of the Act governing arbitration procedures. Those references do not contain express language waiving sovereign immunity. See *Lane v. Pena,* ___ U.S. ___, 116 S.Ct. 2092 (1996). Further, they do not create an "overwhelming implication" that a State must waive its Eleventh immunity to be designated as a State licensing agency. *Atascadero.*

In addition, this conclusion is supported by the Administrative Procedures Act. The Act specifically incorporates the Administrative Procedures Act ("APA") which states in 20 U.S.C. § 107d-2(a) that "Such panel shall, in

accordance with the provisions of subchapter II, of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5."

Title 5 U.S.C. § 702 authorizes a person aggrieved by an agency action to bring "(a)n action in a court of the United States seeking relief *other than money damages*" (emphasis added). The Act and the APA specifically do not waive a State's immunity to actions for money damages. See *Lane v. Pena*, ___ U.S. ___, 116 S.Ct. 2092, 2098 (1996) (no waiver of federal government's sovereign immunity against monetary damages by 5 U.S.C. § 702).

B. The Courts Of Appeals Conflict On Whether A State Waives Its Eleventh Amendment Immunity By Applying To Be a State Licensing Agency.

The Ninth Circuit in this case and the Third Circuit concluded that States waived their Eleventh Amendment immunity by applying to be State licensing agencies under the Act. *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997); *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985). These decisions conflict with the Court of Appeals for the Sixth Circuit which held that a State did not waive its sovereign immunity. *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Court of Appeals for the Eighth Circuit could not reach a consensus on the question. *McNabb v. U.S. Depart of Education*, 862 F.2d 681 (8th Cir. 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 5, 1997.

Respectfully submitted,

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No. 97-641

In the Supreme Court of the United States

OCTOBER TERM, 1997

BRENDA PREMO, DIRECTOR, CALIFORNIA DEPARTMENT OF REHABILITATION, PETITIONER

v.

JEANA MARTIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to consider petitioner's claim that the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, does not require state licensing agencies to pursue a vendor's grievances against a federal agency.

2. Whether the Randolph-Sheppard Act authorizes an arbitration panel to award compensatory damages to a vendor as a remedy for a state licensing agency's failure to pursue a vendor's grievances against a federal agency.

3. Whether a State, by participating as a state licensing agency under the Randolph-Sheppard Act, waives its immunity against federal court enforcement of an arbitration award for monetary damages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 119 F.3d 764. The opinion of the district court (Pet. App. B1-B22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The petition for a writ of certiorari was filed on October 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, establishes a cooperative federal-state program

to provide blind persons with opportunities to operate vending facilities on federal and other properties. 20 U.S.C. 107(a) and (b). The Secretary of Education has overall responsibility to administer the Act, as well as authority to promulgate regulations to carry out the Act's purposes. 20 U.S.C. 107(b), 107a(a); see 34 C.F.R. Pt. 395.

As part of his responsibilities, the Secretary designates state licensing agencies (SLAs) to implement the program. 20 U.S.C. 107a(a)(5). A State's participation in the program is voluntary, and a state agency wishing to be designated as an SLA must apply to the Secretary and agree to specified conditions. 20 U.S.C. 107b. For example, the Act requires SLAs to negotiate with federal agencies for the operation of vending facilities on federal sites, 20 U.S.C. 107a(c), and to equip the facilities, 20 U.S.C. 107b(2). The Act also imposes obligations on federal agencies to make vending facilities available to blind persons. 20 U.S.C. 107a.

A blind vendor who is dissatisfied with the action of an SLA must first seek relief from the SLA. 20 U.S.C. 107b(6), 107d-1(a). If the vendor is dissatisfied with the SLA's resolution of the matter, the vendor may "file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." 20 U.S.C. 107d-1(a). Whenever an SLA determines that a federal agency is failing to comply with the Act, it may file a complaint with the Secretary, who will then convene an arbitration panel to address the dispute. 20 U.S.C. 107d-1(b), 107d-2(b)(2).

Arbitration panels must give notice and conduct a hearing in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See 20 U.S.C. 107d-2(a). The ruling of such a

panel constitutes "final agency action" for purposes of judicial review under the APA, even though the Secretary has no authority to review or modify the arbitral decision. *Ibid.* Apart from such judicial review, the arbitral decision is "final and binding on the parties." 20 U.S.C. 107d-1(a).

2. The California Department of Rehabilitation (Department) is the SLA for the State of California. In 1985, the Department issued a license to respondent Jeana Martin, a blind person, to operate a snack bar and lunch room at the United States Post Office in Santa Ana, California. Pet. App. A3. In 1992, the Department revoked respondent's license based on her failure to satisfy financial obligations. *Ibid.*

Respondent filed a complaint with the Department of Rehabilitation, alleging that the Department had failed to take adequate steps to ensure that the Postal Service complied with the Act. Pet. App. A3. Respondent also filed a complaint alleging that the Department had wrongfully terminated her license. *Id.* at A3-A4. The Department denied relief. *Id.* at A4. Respondent subsequently invoked her right to arbitration. *Ibid.*

In 1994, the arbitration panel ruled in favor of respondent. Pet. App. C1-C27. The panel concluded that the State had violated the Randolph-Sheppard Act by failing to renovate respondent's vending facilities, by failing to insist on assignment by the Postal Service to respondent of income from competing vending machines, and by failing to take steps to prevent the Postal Service from renewing a contract with another vendor. *Id.* at C24. The panel also concluded that the State's violations had caused respondent's financial difficulties and that the State had therefore wrongfully terminated respondent's license. *Ibid.* In

a later remedial ruling, *id.* at D1-D8, the panel concluded that it had authority to issue an award that would compensate respondent for all losses traceable to the State's violations of the Act. *Id.* at D2. The panel ordered a monetary award, including damages and attorney's fees, totaling approximately $450,000. *Id.* at D6. The panel also ordered the State to reinstate respondent's license, to place her at a vending facility comparable to the one she had previously operated, and to compensate her at a specified rate until that was done. *Ibid.*

3. Petitioner Premo, the Director of the Department of Rehabilitation, then filed suit in the United States District Court for the Central District of California against the Department of Education, the Secretary of Education, and respondent. Pet. App. A4-A5. Petitioner alleged that the arbitration panel's award of compensatory damages and attorney's fees violated the Eleventh Amendment to the Constitution. *Id.* at A5. Petitioner further alleged that certain procedural aspects of the arbitration violated the Due Process Clause. *Ibid.* Respondent asserted a counterclaim against petitioner, seeking an order enforcing the arbitral award. *Ibid.* Although not included in her complaint, petitioner argued in a dispositive motion that the Randolph-Sheppard Act does not require an SLA to pursue a vendor's grievance against a federal agency. *Id.* at B19.

The district court granted summary judgment in favor of all respondents. Pet. App. B1-B21. The court held that, by voluntarily participating in the Randolph-Sheppard program, the State had waived its sovereign immunity against a damage award by an arbitration panel as well as its immunity from federal court enforcement of such an award. *Id.* at B12-B14.

The court also rejected petitioner's Due Process claims. *Id.* at B15-B19. The court held that a State may not assert a due process claim, and that, in any event, petitioner's claims of procedural unfairness were without merit. *Ibid.* The court refused to address petitioner's argument that the Act does not require an SLA to pursue a vendor's grievance against a federal agency. *Id.* at B19-B20. The court concluded that, because petitioner raised that issue for the first time in a motion and did not make that claim in her complaint, that issue was not properly before the court. *Id.* at B20.

Following the district court's entry of final judgment, petitioner filed a motion seeking leave to file an amended complaint in order to assert a claim that the Act does not require an SLA to pursue a grievance against a federal agency. Pet. App. A5; Pet. 7. The district court denied the motion. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A14. The court held that the Eleventh Amendment does not limit the authority of an arbitration panel to award compensatory relief. *Id.* at A8. The court explained that, "[i]n referring to the 'Judicial power of the United States,' the Amendment on its face limits only the authority of Article III courts," and "does not purport to affect proceedings in tribunals established by statute." *Ibid.* The court also concluded that the arbitration panel had statutory authority to award compensatory damages to respondent. *Id.* at A9-A10. The court noted that the parties, including petitioner, did not dispute that point, and that the courts of appeals had generally agreed that the text of the Act permits arbitration panels to award compensatory relief since "the prevailing conception at the time the Act was passed was that arbitral resolution

of disputes involved awards of back pay and other forms of compensatory relief." *Id.* at A9.

The court of appeals next held that the Eleventh Amendment did not preclude federal court enforcement of the arbitration panel's award of compensatory relief. Pet. App. A11-A12. The court recognized that under this Court's decisions, a waiver of Eleventh Amendment immunity will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* at A10 (quoting *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 305 (1990)). Here, the court concluded, the "overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." *Id.* at A13.

The court of appeals also rejected petitioner's procedural objections to the arbitration. Pet. App. A12-A13. Finally, the court of appeals ruled that the district court had acted within its discretion in declining "to allow the State to expand its case" by means of a post-judgment amendment to the complaint. *Id.* at A14. The court noted that "the State had ample opportunity to file an amended complaint with new allegations before the court issued its final judgment," and that "the likelihood that amendment will cause undue delay in the proceedings is a legitimate rationale for denying a motion to amend," particularly "[a]fter a judgment has been issued." *Ibid.*

ARGUMENT

1. a. Petitioner contends (Pet. 12-13) that the Court should grant review to resolve the question whether the Randolph-Sheppard Act requires an SLA to pursue a vendor's grievances against a federal agency. That question is not properly presented here.

As the district court found, petitioner did not include in her complaint any allegation that the arbitration panel had acted contrary to law in holding that an SLA has a duty under the Randolph-Sheppard Act to pursue vendor grievances against a federal agency. Pet. App. B19-B20. Instead, without seeking leave to amend her complaint, petitioner raised that question for the first time in one of her dispositive motions. *Ibid.* As a consequence, the district court concluded that the issue was not properly presented and did not consider it. *Id.* at B20. The district court subsequently denied petitioner's post-judgment motion to amend her complaint to raise that issue. *Id.* at A5; Pet. 7. Although petitioner sought to raise that issue on appeal, the court of appeals similarly refused to consider it. *Id.* at A14. Noting that petitioner had ample opportunity to amend her complaint prior to the entry of judgment, the court of appeals held that the district court did not abuse its discretion in refusing to entertain petitioner's belated effort to raise the issue. *Ibid.* Petitioner does not challenge that procedural ruling here. See Pet. i, 12-13.

Because petitioner failed to raise in a timely manner the question whether an SLA has a duty to pursue vendor grievances against a federal agency, and because the lower courts did not consider the issue, that question is not properly presented here. For the same reason, petitioner errs in contending

that there is a conflict between the decision below and the holding in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482, 1487 (11th Cir. 1990), that a vendor has "no substantive right to challenge a state's failure to file a complaint against a federal entity." As a result of petitioner's procedural default, the court below simply did not address that issue.

b. Petitioner's failure to raise the question of liability in a timely manner not only affects the propriety of granting review on that question; it also affects the propriety of granting review on the two other questions petitioner seeks to present concerning the authority of an arbitration panel to award compensatory relief for the violation found by the arbitration panel and the authority of a federal court to enforce such an award. Citing the nearly $450,000 damage award in this case, the amici brief filed by certain States argues (at 5) that the decision below warrants review because it opens the door to similar awards against other States. It is entirely possible, however, that the decision below is an aberration that is attributable to petitioner's failure to raise her liability argument in a timely manner. The only court of appeals to have considered the issue has ruled that a State is not liable in circumstances like those presented here. See *Nash*, *supra*. Had petitioner properly presented the liability argument she attempts to raise belatedly, the result below could well have been different, and it is speculative, at present, whether the decision below will lead to comparable judgments in future cases.

The very real possibility that there may be no violation in circumstances like those presented here also makes the remedial questions raised by peti-

tioner abstract and hypothetical.[1] In effect, the Court would be required to decide whether Congress intended to condition the State's participation in the Randolph-Sheppard program on the State's consent to compensatory relief and federal court enforcement of such relief that is designed to remedy conduct that quite possibly does not violate the Randolph-Sheppard Act. Such abstract and hypothetical questions are not suitable for this Court's review.

2. Even apart from the considerations discussed above, the question whether arbitration panels have authority to grant compensatory damages does not warrant review.

a. Although petitioner now contends (Pet. 13-17) that arbitration panels do not have authority to award compensatory damages, the court of appeals understood petitioner as "not disput[ing] that, as a matter of statutory construction, the Randolph-Sheppard Act gives arbitration panels the authority to award compensatory relief." Pet. App. A9. That understanding appears to have played a role in the court of appeals' disposition of that issue. *Id.* at A9-A10. It is therefore unclear whether the decision below will be regarded in the Ninth Circuit as binding precedent on the question whether an arbitration panel has statutory authority to award compensatory relief.

b. In addition, while petitioner contends that the Randolph-Sheppard Act does not give arbitration panels authority to award monetary damages under any circumstances (Pet. 11), no court of appeals has

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[1] The federal respondents took no position in the courts below on whether the Act imposes an enforceable duty on an SLA to present claims to a federal agency on behalf of a blind vendor.

adopted that view. The Third and the Sixth Circuits have both held that arbitration panels have authority to award monetary damages. *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985); *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992). Because the Act gives a vendor the right to submit any dispute with an SLA to arbitration, and arbitrators in other contexts have typically had authority to award damages, those courts have concluded that Congress intended to condition a State's participation in the program on the State's consent to the possibility that an arbitration panel would award damages against the SLA for violations of the Act. *Ibid.* The Eighth Circuit is the only other court of appeals to have addressed the issue squarely, and it held that, while arbitration panels could not award compensatory relief in the form of "retroactive damages," such panels could award compensatory relief in the form of "prospective damages." *McNabb* v. *United States Dep't of Educ.*, 862 F.2d 681, 683 (8th Cir. 1988), cert. denied, 493 U.S. 811 (1989).

c. Petitioner contends (Pet. 14) that the Eleventh Circuit's ruling in *Nash* conflicts with the Third Circuit's decision in *Delaware* and the Sixth Circuit's decision in *Tennessee*. But the decision in *Nash* turned on the court's holding that SLAs do not have an obligation under the Act to file complaints against federal agencies. 915 F.2d at 1488-1495. That court did not suggest that there was any general limitation on the power of arbitrators to redress violations through awards of compensatory relief. To the contrary, the *Nash* court noted with apparent approval the Third Circuit's holding in *Delaware* that arbitra-

tion panels have authority to award compensatory damages against SLAs. *Id.* at 1492. As petitioner notes (Pet. 13), the Eighth Circuit's decision in *McNabb* conflicts with *Delaware* and *Tennessee* to the extent that *McNabb* holds that an arbitration panel may not award retroactive compensatory relief. But the *McNabb* decision was issued ten years ago, before the Sixth Circuit's decision in *Tennessee* and the Ninth Circuit's decision in this case. Moreover, that decision was highly fractured, with one judge concluding that compensatory relief is generally available, 862 F.2d at 684-685 (Lay, J., concurring and dissenting), one concluding that such relief is never available, *id.* at 685-687 (Fagg, J., concurring and dissenting), and one striking the middle ground that retroactive compensatory relief is not available, but that prospective compensatory relief, fees, and costs are available, *id.* at 687-688 (Doty, J., concurring and dissenting). In light of more recent developments and the fragmented nature of the decision in *McNabb*, the Eighth Circuit may well be prepared to revisit the issue. The decision in *McNabb* therefore does not provide a sufficient justification for granting review in this case. And that is particularly true in light of the special features of this case that have already been discussed.[2]

3. Petitioner's contention (Pet. 8-12) that a federal court does not have authority to enforce an arbitra-

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[2] As the court of appeals held (Pet. App. A8), the question whether an arbitration panel may award compensatory relief does not itself raise an Eleventh Amendment question since that Amendment, by its terms, affects only the "Judicial power of the United States." Petitioner does not appear to contend otherwise. Compare Pet. 8-12 with Pet. 13-17.

tion panel's award of compensatory relief also does not warrant review. The decision below that federal courts have such authority is at odds with the position we took below, and it conflicts with the Sixth Circuit's decision in *Tennessee*. As previously discussed, however, the uncertainty concerning whether there was a violation in this case at all makes this an unsuitable vehicle for resolving remedial questions. Moreover, several other considerations suggest that review is not warranted.

a. First, there is no contention in this case, and the court below did not hold, that Congress would have authority to subject an unconsenting State to a federal court action to enforce an arbitration panel award issued pursuant to the Randolph-Sheppard Act. Rather, the court below held, and petitioner does not dispute, that Congress has authority under the Constitution to condition a State's participation in the Randolph-Sheppard program on the State's willingness to consent to federal court enforcement of arbitration awards that include monetary relief. The question presented is therefore essentially one of statutory construction—whether Congress clearly intended to condition a State's participation in the Randolph-Sheppard program on such consent. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985).

b. Second, the court of appeals applied the correct legal standard for resolving that issue. The court noted that it is proper to conclude that Congress has conditioned State participation in a program on its consent to suit only "where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Pet. App. A10 (quot-

ing *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 305 (1990)). The disagreement between the parties centers on the application of that standard to the unique statutory text and structure of the Randolph-Sheppard Act, including its unusual provision for arbitration of disputes with blind vendors, to which the State, through its SLA, unquestionably consented by agreeing to participate in the program.

c. Third, Congress clearly did intend to condition a State's participation in the Randolph-Sheppard program on the State's willingness to submit the question of what relief is appropriate for violations of the Act to an arbitration panel, subject only to review by a federal court. The Act provides that the State shall "agree to submit the grievances of any blind licensee not otherwise resolved * * * to arbitration as provided in section 107d-1." 20 U.S.C. 107b(6). The referenced provision, in turn, states that, except as otherwise provided in the Act, such arbitration "shall be final and binding on the parties." 20 U.S.C. 107d-1(a). The Act provides for review of an arbitration decision through a single mechanism: a suit in federal court pursuant to the judicial review provisions of the APA, 5 U.S.C. 701 *et seq.* See 20 U.S.C. 107d-2(a). Thus, when as here, an arbitration panel awards monetary damages, and the State seeks review of that decision in federal court, the State has consented to a federal court decision concerning whether the arbitration panel had authority to award monetary relief. The question presented here is therefore the extremely narrow one of whether, in such a case, the State's consent encompasses a counterclaim by the vendor for the enforcement of that very same award.

d. Fourth, at least as a general matter, it is unlikely that there will be any significant practical dif-

ference between a federal court order "affirming" an arbitration panel's award and a federal court order "enforcing" such an award, since the Act makes the arbitration award "binding" on the State even in the absence of a judicial order of enforcement. In particular, we have no reason to believe that a State would view its obligation to comply with a binding arbitration award differently depending on whether the federal court affirmed the arbitrator's award or instead both affirmed the award and ordered its enforcement. We must assume that the State would feel obliged to pay the award in either event, and indeed petitioner does not assert otherwise in this case.

e. Finally, there has been a paucity of litigation involving Randolph-Sheppard arbitration procedures, and there is no reason to expect that the volume of such litigation will increase. The Third Circuit rendered its decision in *Delaware* more than a decade ago, and litigation has been sporadic ever since.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIEF OF RESPONDENT JEANA MARTIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Jeana Martin hereby undertakes her own statement of the questions presented on this petition, convinced that the petition's version not only suffers from lack of adequate focus in the substantive sense, but also ignores entirely threshold issues militating against this Court's intercession.

The overarching question on this petition is whether the petition sets forth "compelling reasons" for granting it in accordance with the criterion prescribed by this Court's own Rule 10.

Subsumed at the threshold as to all the questions claimed in the petition to be involved are issues as to whether this Court should decline to intercede in view of postures chosen by petitioner below which were redolent of lulling concession, invitation, and/or waiver and consent.

More accurately framed (absent foreclosure at the threshold), the questions said by the petition to be presented should be:

(a) Whether, by electing to have agencies of theirs agree to the terms and conditions imposed by Congress to qualify as state licensing agencies administering at the state level the federal program for the benefit of the blind created by the Randolph-Sheppard Act (20 U.S.C. §§ 107, *et seq.*), participating States have consented to waive the Eleventh Amendment of the United States Constitution and expose themselves to potential suit in federal court.

QUESTIONS PRESENTED – Continued

(b) Whether state licensing agencies undertaking administration of the Randolph-Sheppard Act have been left by Congress with complete and unfettered discretion not to take the remedial action authorized by the Act against federal agencies violating the Act, regardless of how clear the violations and resulting harm to the blind beneficiaries of the Act may be.

(c) Whether arbitration panels convened under the Randolph-Sheppard Act to arbitrate disputes between blind vendors and state licensing agencies are powerless to fashion relief commensurate with the scope of inquiry and have not been given authority by Congress to grant a vendor relief inclusive of monetary damages even if the panel finds such relief to be appropriate in the circumstances proved by the vendor.

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BRIEF OF RESPONDENT JEANA MARTIN IN OPPOSITION TO PETITION FOR CERTIORARI

PROVISIONS OF LAW

With the caveats and the clarifications now to be indicated, respondent Jeana Martin (hereafter often "Ms. Martin") does not disagree with the petition's submission under the heading, "Constitutional and Statutory Provisions," as far as it goes. Also of particular importance and interest here are provisions unmentioned in the petition.

As to the Randolph-Sheppard Act, Ms. Martin views the petition's submission as too summary and fragmented for adequate appreciation in several important respects. More inclusive quotation of the Act is set forth and attached hereto as Appendix 1 to facilitate ready and deserved verbatim attention in general and as to the following in particular:

(a) The Act's unmistakable purpose and intent of creating a program for the economic benefit of the blind by establishment for them of a "priority" to engage in vending operations generally on federal property, including vending machine operations, and to be honored by the various federal agencies respectively in charge of properties subject to the Act (20 U.S.C. § 107, subdivisions (a) and (b), App. 1 hereto, pp. 1-2);

(b) The wide-ranging commitments required of state agencies in voluntarily seeking to qualify as state licensing agencies to implement and administer the program at the state level, including the commitment to observe the detailed procedure provided to resolve "any" dispute between them and blind vendors in their charge (20 U.S.C. §§ 107b, subdiv. (6) and 107d-1, subdiv. (a), App. 1 hereto, pp. 3-4); and,

(c) Inclusion in that procedure (20 U.S.C. §§ 107d-1(a) and 107d-2(a), App. 1, p. 4) of arbitration whose outcome shall be "final and binding" unless appealed under the Administrative Procedures Act.

Lest there be confusion due to the petition's reference generally to the responsibilities and services under the Act of a state licensing agency (hereafter "SLA"), the phrase "to

negotiate with federal agencies to obtain locations for vending facilities upon federal property" (at p. 2), should not be understood to mean that federal agencies in charge of property have been left free by the Act to allow vending operations by others than the blind unless and until the SLA persuades the federal agency to do otherwise through negotiation. The vending priority of the blind on properties under the Act is imposed by the Act itself in the provisions cited above upon those in charge of the property (although such things as location design, products to be sold, etc., are "negotiated" by the SLAs).

The provisions of the Act buttressing the priority of the blind as to vending machines outside a vendor's facility but located on the same property have two especially noteworthy aspects in regard to a situation like Ms. Martin's. If such machines are not in "direct competition" with the vendor's facility, the vendor is to receive thirty percent of the income derived from them, but, if they are in such "direct competition," the vendor is to receive "100 per centum" of the income produced. (20 U.S.C. § 107d-3(b)(1).)

As to the Administrative Procedures Act (hereafter "the APA"), referred to by the Randolph-Sheppard Act, the petition omits an important aspect of the APA section (5 U.S.C. § 706) regarding the things to be considered given due challenge of final administrative action. That APA section makes it clear that responsibility of the reviewing courts does not invariably extend to all the matters specified but only to those necessary to decision "and when presented."

Omitted in its entirety in the petition is the APA section providing that, absent a different specification in the enactment involved, the proper court in which to challenge an administrative agency's final action is any "court of competent jurisdiction." (5 U.S.C. § 703.) That section also makes it clear that, "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

Two rules are so crucial here as to merit special attention at this juncture. One is Rule 13 of the Federal Rules of Civil

Procedure, relating to counterclaims (reproduced and attached hereto as Appendix 2). The other is this Court's own Rule 10 which cautions that certiorari petitions will be granted "only for compelling reasons," and it makes clear that even conflicts of courts of appeals' decisions with one another or with the decision of this Court on an "important" federal question merely indicate the character of reasons considered by this Court but do not control or fully measure the Court's discretion.

CORRECTIVE STATEMENT OF THE CASE

Regrettably, Ms. Martin is forced to submit her own statement of the case in considerable detail in order to overcome the mischief worked by the petition.[1] Her concern is that, in various objectionable ways and more, perhaps, by what it has ignored than by what it has narrowly and selectively discussed, its version is apparently and unfortunately designed to convey the misimpression that, at all stages below, each of the questions and related contentions now advanced should have been decided in favor of, and was diligently pursued by, the State but fell on deaf ears.

1. The Arbitration

To the extent stated or intimated in the petition's account of the arbitration, every aspect of the following is fallacious and objected to: (a) that Ms. Martin's arbitration complaint and supplemental complaint and the panel's decisions and awards dealt with nothing more than a wrong committed by the Postal Service, rather than any wrong directly attributable to the State itself; (b) that the Postal Service's only violation of the Act at issue was the withholding of income from vending machines not part of Ms. Martin's location but in the same building; (c) that, "specifically," the loss of income from those vending machines related to a relatively short two-

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[1] Although the federal respondents' "Statement" is a definite improvement, further attention as to several important features is called for.

year period beginning in September 1989 during which that loss resulted from the low-pricing "break-even" contract between the Postal Service and a private competitor of Ms. Martin, which contract was terminated with reasonable speed through the Department of Rehabilitation's arbitration proceeding ultimately begun against the Postal Service and culminating in a settlement putting things to right; (d) that, in finding the State liable for all Ms. Martin's harm solely on the basis of the State's failure to take formal remedial action against the Postal Service sooner, the panel conjured up a "non-discretionary" obligation of SLAs under the Act to pursue, as protectors and surrogate agents of the vendors, all grievances to litigated conclusion if necessary regardless of merit; (e) that the panel based the existence of such an obligation on a single provision, rather than on the language and spirit of the Act as a whole; and (f) that the relief awarded consisted of only money damages granted in disregard of the State's diligent claim that the panel lacked power to award such damages, as a matter of statutory construction of the Act itself.

All such insinuations are not only contrary to fact but are belied in all essential respects on the faces of the panel's liability and remedies decisions and awards, which the State could not escape attaching to its petition (Appendices C and D). Without here engaging in detailed repetition of those decisions, which speak eloquently for themselves, we note a few points in demonstration of the thorough and thoughtful way in which the evidence and contentions in actuality then put before it by the parties were considered and disposed of by the panel.

It took more than seventeen pages of the liability decision for the panel's initial reference to the background and evidentiary considerations it found persuasive in Ms. Martin's favor on her claims of multi-faceted and disastrously harmful wrongdoing by the State. In prelude to its dispositive discussion of liability (Pet. App. C, p. 18) the panel summarized its views as follows:

> "Upon the complaint and supplement to the complaint, the evidence adduced at the hearing, the

> documentary evidence submitted by the parties, the post-hearing briefs of the parties, and the entire record herein, the Arbitration Panel finds that Respondent violated the letter and spirit of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act"), as set forth below, in its relationship with Complainant. The testimony and documentary evidence establish the validity of the Complainant's claims against Respondent. Respondent failed to protect the program or uphold the law as it was bound to do under the assurances it gave the Secretary of Education in exchange for its designation as a State Licensing Agency ("SLA") pursuant to the Act.
>
> "In broad terms, the State violated the spirit and letter of the Act by failing to protect the priority accorded blind vending facilities under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which blind vendors were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; and finally, by terminating without sufficient foundation Complainant's license and her means of self-support. Those failures, taken together, represent a substantial violation of the State's assurances to the Department of Education. . . . "

(To the same effect, see Pet. App. C, p. 24.)

In the amplifying discussion which followed, the panel stressed: (a) that Ms. Martin's income loss did not simply relate to the withholding from her of vending machine income as such but also to her loss in her own vending operations due to the deflection of patronage to the subject machines; (b) that the wrongdoing violative of her priority under the Act was not limited to the two-year period during which the "break-even" contract was in force but to the entirety of her tenure at the facility, beginning in 1985 and ending in 1991; and (c) that, based on both documentary evidence and the panel's own visit

to the site, it was obvious that the subject vending machines had been in "direct competition" with Ms. Martin's facility, thus entitling her to one hundred percent of the income they produced. (Pet. App. C, pp. 14, 17, 19-23.)

The reality is that, as the matter was tried before the panel, the contest focused on factual issues, not legal ones. The strategy of the State at the arbitration (perpetuated in the courts below but now wisely dropped) was to prove that the State acted reasonably and that Ms. Martin's financial misfortunes could not reasonably be found to have resulted from the matters complained of by her because, in truth, her economic collapse was due to nothing more than her own incompetence, irresponsibility, and lack of qualifications as a successful vendor. The supporting evidence detailed by the panel (Pet. App. C, pp. 8-18) was strong, much of it being documentary in character and essentially irrefutable, particularly since it was authored by the Department of Rehabilitation itself. Such was the case as to the State's blame-shifting stratagem, as the liability decision expressly pointed out in detail in rejecting the idea. The panel stressed that it found more credible than witnesses produced by the State years after the fact the glowing evaluations and other Department documentation to the effect that, even in the midst of her financial difficulties, Ms. Martin was an excellent and exceptionally qualified vendor, one of the best in the program. (Pet. App. C, pp. 22-23.)

Nowhere did the panel make, or have any need to make, reference to a "non-discretionary" obligation of SLAs to pursue claims against federal agencies for violations of the Act to litigated conclusion even if perceived to lack merit. Nor, conversely, did the State make, nor would have wanted to make, its present contention that SLAs in all events have absolute discretion under the Act not to take any formal action at all against offending federal agencies even if their violations of the Act are clear. Indeed, as noted by the panel (Pet. App. C, pp. 18-24), the Department evidenced in various ways its awareness of its obligations under the Act to take formal action against a federal agency's continuing conduct in violation of the Act.

For example, on October 6, 1989, just a month after the "break-even" contract had taken effect, an official in the Department wrote a letter, reproduced and attached hereto as Appendix 3, warning the Postal Service that the contract was in clear violation of the Act and had already shown it would reduce Ms. Martin's income by more than fifty percent and that, unless the problem was quickly resolved, the Department "will be forced" to take the remedial steps allowed by law. Actually, as noted by the panel (Pet. App. C, pp. 21-22), the Department had demonstrated awareness of its responsibility under the Act before Ms. Martin even began her tenure by maintaining a successful arbitration against the Postal Service which established that a "break-even" contract affecting a vendor in San Francisco was illegal.

Also, the fact is that, after allowing a year to elapse following the warning of October 1989 (and transparently in an effort to diffuse Ms. Martin's appeal to the Department's Appeals Board commenced by her months earlier but then scheduled to be heard a week away), the Department did belatedly begin an arbitration proceeding against the Postal Service in regard to the illegal contract affecting Ms. Martin, albeit a proceeding allowed to languish until after Ms. Martin left the affected location in 1991 and so wanly pursued as to result in a settlement which, although ameliorating the situation to some extent as to the future, absolved the Postal Service from having to pay anything to Ms. Martin to redress the financial disaster she was caused to suffer during her tenure.

At no point in the arbitration did the State make a contention, as it does now, that arbitration panels under the Act, as a matter of purely statutory construction independent of the Eleventh Amendment, lack any power or authority to grant deserving blind vendors relief in the form of money damages. To the contrary, the State affirmatively recognized the panel's power to award damages. A telling example is the conclusion of the State's brief in support of its motion to

dismiss made before the arbitration hearing even began.[2] The relevant page of that brief is reproduced and attached hereto as Appendix 4.

And the relief the panel proceeded to grant was hardly limited in the way indicated in the petition. The remedial award granted no damages at all in regard to the "break-even" contract, with the explanation that an overlap might occur in view of the award being made to redress the harm done by violation of Ms. Martin's priority throughout her tenure. (Pet. App. D, p. 3.) Also contrary to the intimations in the present petition, damages were awarded for the State's own protracted failure to perform the needed and promised remodeling and upgrading of Ms. Martin's location. (*Id.* at p. 4.) In regard to the Department's wrongful revocation of her vending license, the relief ordered by the panel was only futuristic in reach and was essentially injunctive in character. The Department was ordered to restore her license and to place her "forthwith" in a vending facility within the State's blind vendor program producing monthly income of $5,731.94, the amount found to be what she would be currently earning at her former Postal Service facility after cure of the harmful wrongs to which she had been subjected. Accordingly, in the event of delay by it beyond January 31, 1995, in implementing the injunctive relief, the State was ordered to pay Ms. Martin $5,731.94 for each month until that relief was in fact implemented. (*Id.*, at p. 6.)

Noteworthy also in view of the shortcomings of the arbitration the petition alludes to is that the panel expressly reserved jurisdiction of the matter for ninety days following its decision "for the purpose of receiving any motion, information, or other matter related to the effectuation of the Panel's decision and award." (*Id.*, at p. 6.) The State did not avail itself of that continued jurisdiction. Instead, without

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[2] The understandably unsuccessful motion to dismiss was based on the theory that, as a practical matter, the arbitration would be a pointless waste of time because, assertedly, the only relief the panel would award if finding for Ms. Martin would be damages and such relief could not be enforced in federal court by reason of the Eleventh Amendment.

giving the panel opportunity to cure any perceived error, the State hurried to the District Court.

2. The Proceedings in the District Court

As to what actually happened in the District Court, the petition is also muffling and misleading. This is true not only as to whether the State was duly diligent in pursuing there all the questions and contentions it now asks this Court to consider, but also as to the fact that Ms. Martin as a defendant put in issue before the District Court from the start confirmation and enforcement of the arbitration awards in her favor the State came to the court as a plaintiff to attack.

At no time prior to the District Court's judgment did the State include in its pleadings, in spite of being allowed to amend the original twice, any allegations challenging the arbitration awards on two of the three grounds now urged. The pleadings did not challenge the award on either the ground that the Act does not authorize damages relief or on the ground that the panel had disregarded the complete discretion of SLAs not to take remedial action on behalf of aggrieved vendors against federal agencies violating the Act. The State's second amended complaint challenged the awards on grounds in addition to the alleged unenforceability in federal court because of the Eleventh Amendment (Pet. App. B, pp. 15-20), but they involved the claimed denial of due process resulting from the participation of two persons in the arbitration (a claim not now made).

From the inception in response to the State's pleadings, Ms. Martin filed not only denying answers but also counterclaims affirmatively alleging the validity of the arbitration awards in all respects and praying that the court uphold them and order their enforcement forthwith. (Pet. App. B, p. 20.)

As agreed by the parties, the District Court resolved the action as a matter of law on the basis of the arbitration record and upon appropriate cross-motions by the parties to assist the court to that end. It is true, as indicated in the petition, that, in the course of its motion for disqualification of the panel, for reversal of the awards and for convening of another panel to

arbitrate the matter anew, the State attempted to interject claims of error additional to those it had pled, including the complete-discretion claim now urged. Those bare bones, however, hardly tell, and even hide, the full and strange story.

The fact is that, in its initial memorandum in support of the disqualification/remand motion, the State openly acknowledged just the opposite of what is now argued. It said that the Act "imposes an obligation" on a SLA to "protect" the vendor's "priority" and that the SLA "must" pursue a vendor's grievance when the vendor's "rights" are "arguably" being jeopardized by a federal agency's actions. (See, Memorandum pages 12-13 reproduced and attached hereto as App. 5.)

Later, in the reply to the defendants' oppositions to its motion, the State made a remarkable about-face. Having apparently discovered to its chagrin that a District Court decision influencing its acknowledgment of obligation had been overruled on appeal, the State did not hesitate to change horses in mid-stream in abandonment of its opening position and to invoke some broad language in the appellate decision that SLAs have complete and unfettered discretion both as to whether a federal agency is in fact violating the Act and as to whether it should in all events be subjected to formal remedial action by the SLA. (Memo., pp. 5-6, reproduced and attached as App. 6.)

Disposing with particularity of the issues pled but obviously in light of its own review of the arbitration record, the District Court concluded, "For the reasons expressed above, and after reviewing the record of the arbitration proceedings, the Court finds that the orders of the arbitration panel were adequately supported by the evidence, and were not arbitrary, capricious, or an abuse of discretion." It denied the State's motions and granted those of the defendants, including Ms. Martin's motion for summary judgment on her counterclaim. (Pet. App. B, p. 20.) Judgment was entered accordingly,

including the order that the State "shall comply forthwith" with the panel's remedial decision. (*Id.*, p. 2.)[3]

3. The Court of Appeals' Opinion

In regard to the petition's brusque treatment of the opinion of the Court of Appeals (Pet. App. A), our basic response is that the opinion speaks best for itself as to what it did and did not do. From our perspective, in affirming the judgment, it focused preponderantly on the Eleventh Amendment question, and properly so in view of what had transpired below and what was developed and contested in the briefs of the parties and at oral argument. The rejection of the Eleventh Amendment as a bar was a result reached on the basis of the Court of Appeals' careful analysis of the language of the Act, as well as the impact of the Randolph-Sheppard authority it found persuasive and the teaching of this Court in point.

The petition asserts that the State's complete-discretion contention was not addressed and that factual error was committed in saying that there was no dispute that the arbitration panel had authority to award damages as relief under the Act. That statement in the opinion certainly is in accord with the State's affirmatively taken position at the arbitration and with the absence of any pleading in the District Court departing from that position. In all events, if such faults had been genuinely perceived at the time to have importance, rather than being the outgrowth of strategy for present purposes, the State's best recourse for cure would obviously have been a petition for rehearing. The State filed none.

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[3] The court of appeals correctly held (App. A to Pet., p. 14) that the District Court's denying the State leave to amend its complaint after the judgment was a proper exercise of discretion, and the State does not now claim otherwise.

REASONS FOR DENYING THE PETITION

As to all of the three questions advanced by the petition to induce this Court's intercession, there are, we respectfully submit, two lines of analysis and reasoning against a grant, each by itself decisive. One line involves threshold considerations of the State's conduct below amounting to concession, lulling invitation, or waiver and consent. The other demonstrates the petition's failure in any event to show an occasion for a grant. Further, a denial is forcefully called for by overarching practical and equitable considerations.

I. The Complete and Absolute Discretion Question

Immediately below, beginning with the threshold impediments, we address first the purported but realistically phantom question which, for the sake of brevity, we will sometimes, as we have already to some extent, refer to as the complete-discretion or absolute-discretion question.

As we have seen, it was late in the game, indeed, before the State's lulled opponents before the District Court or the State itself, for that matter, had the slightest reason to think that the State would dare a contention that the Act vests the SLAs with absolutely unfettered and unassailable discretion not to take the remedial action authorized by the Act for them to take against federal agencies violating the Act, regardless of how clear and harmful the violations are. Certainly, no such contention had been made at the arbitration or included as an attack on the arbitration awards in the State's original district court pleading or in either of the two amendments allowed. More lulling still, of course, was the State's own acknowledgment, in its initial memorandum supporting its disqualification/remand motion, of the Act's imposition upon SLAs of a mandatory obligation to "protect" the vending priority and to pursue a vendor's grievance whenever the vendor's rights are "arguably" being jeopardized by a federal agency's actions. (App. 5, pp. 1-2.)

It should not be hard to imagine the surprise of the defendants (not to mention the court) who, having naturally relied on that acknowledgment of obligation in preparing

oppositions to the State's motion, were suddenly treated in the State's reply memorandum with a total about-face and eager embrace of the complete-discretion idea. Yet more, even though the State in the same reply alluded to its readiness to file a third amended complaint to allege attacks on the arbitration additional to its existing pleadings (App. 7 hereto), months elapsed before the judgment without the State's bothering in all that time to attempt the filing of any new pleading (Pet. App. A, p. 14).

Obviously, just because an action begins in an arbitration or administrative hearing, it should not be less subject to the rule, rooted in fairness and kindred concerns and a commonplace in the purely court setting, which bars a party from asserting on review as error anything below which the party conceded or affirmatively invited or caused or passively waived by failure to plead or object or by other acquiescent conduct. The rule has thus been applied in such cases by this Court as well as by others. (*E.g., Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638, 645-646 (1992); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n. 13, *rehearing denied* 426 U.S. 986 (1976); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).) At least partially, it is encouched in the APA section requiring points for review to be "presented" (5 U.S.C. 706), cited by the District Court in duly declining to consider the State's unpled attacks (Pet. App. B, pp. 19-20).

We are not unaware that, in exceptional cases involving special circumstances of a ringing equitable tenor, the general rule has been relaxed. Nothing calling for such special solicitude for the State is involved here. Quite the reverse, about which we hope to have space enough to say more later.

Substantively in any event, the petition does nothing but attempt to brew a tempest in a teapot as to the purported question of complete discretion. It is even mystifying how the present opinion of the Court of Appeals can be said in the petition to be one of the two decisions engendering conflict and confusion on the subject. The petition (at p. 7), complains of the Court of Appeals' failure even to address the issue, so it eludes ready grasp how it can also be accused of addressing the matter in a conflicting way.

Nor is it certain precisely what contribution to the elusive conflict proclaimed by the petition was truly intended to have been made by the other contestant it pushes into the ring. The majority opinion in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990) sheds but faint light on the circumstances in that case surrounding the Marine Corps' closing of the blind vendor's facility. It is hard to tell whether or not something extenuating, such as a budgetary cutback or special military problem, may have been involved to militate against the clarity of the alleged violation. Also, there was not a hint in the opinion of protracted and repeated violations by the federal agency, let alone of the SLA's own direct and affirmative causation of harm to the vendor by anything like, as here, the SLA's own failure to remodel the facility as needed and promised and the wrongful revocation of the vendor's license. And, serving to make the obfuscation come full circle, the majority did take some pains to use qualifying expressions contrapuntal to its more sweeping utterances. For example, at the point of voicing the actual holding, the majority used the words, "at least in the present case," to tether its views to the facts there involved, which, although left unclear in what may have been other significant respects, certainly included the fact, stressed by the opinion, that the SLA had never there determined that the Marine Corps was in violation of the Act. (915 F.2d at p. 1489.)

To be sure, there is broad language in the majority opinion which, considered in the abstract and alone, can be construed as standing for an iron-clad rule that, even if a federal agency clearly violates the Act in a manner seriously harmful to a vendor, the administering SLA has been vested by the Act with absolute discretion not to take against the violator the remedial steps it authorizes. As shown in the dissent (at pp. 1495-1501), such a notion is blind to the Act's purpose and its requirements imposed upon SLAs in carrying out the priority established. It basically derives, instead, from a starkly crabbed reasoning process focusing in a vacuum on the semantic difference between the Act's provisions for vendor-SLA arbitrations (subdivision (a) of 20 U.S.C. 107d-1) and the ones for arbitrations of SLA-federal agency disputes

(subdivision (b) of that section). The word "may" in the latter, entirely appropriate to the end of general authorization dependent upon clarity and importance of violations, was hardly intended to authorize in reverse the condoning by SLAs of clear and harmful violations of the basic priority objective of the very Act SLAs have committed themselves to implement. Undeniably, besides, subdivision (a) all-inclusively mandates availability of the procedure, including arbitration, to every vendor dissatisfied with "any" SLA conduct, thus obviously not excluding SLA handling of violations by federal agencies.

At bottom, in the abstract and alone, the broad language of the majority opinion attributes to Congress the absurdity of establishing a valuable right without a reasonably certain remedy in the event of its violation by federal agencies. In that connection, it merits emphasis that, since SLAs have been made the protectors against abuses, courts have reasoned that blind vendors themselves have no standing to proceed against offending agencies. (*E.g., Randolph-Sheppard Vendors of America v. Weinberg*, 795 F.2d 90, 102-103 (D.C. Cir. 1986); *State of N.Y. v. U.S. Postal Service*, 690 F.Supp. 1346, 1350 (S.D.N.Y. 1988).) It would be a farce, indeed, if the self-same provisions were held both to bar vendors' direct efforts to get relief against offenders and to allow SLAs to refuse at whim to seek such relief for them, thus unconscionably leaving vendors, however clear and harmful the violations, to hang and turn slowly and helplessly in the wind of a legal no-man's land.

Altogether, there is little, if any, likelihood that the reasonably thoughtful will be misled by the subject majority opinion into trusting in a rule of absolute and unassailable SLA discretion without regard to the clarity and harm of federal agency violations. The petition cites no other court of appeals authority for such a notion, and we know of none. In all events, the present decision of the Court of Appeals

neither denounced that notion nor needed to and cannot be understood as in irreconcilable "conflict" with it.[4]

The Act impacts on a relatively few, and, during the nearly quarter century that the procedure to resolve vendor-SLA disputes has been part of it, the decisions involving that procedure have been sparse indeed. The plain truth is that questions in regard to that procedure in general, let alone the shadowy one now at hand, are likely to recur rarely at most in the foreseeable future and to be of narrow reach in all events compared to the plethora of federal questions of widespread concern to the country at large which arise on a regular or even daily basis and which can legitimately be said to be needful of attention at the highest judicial level.

In short, the purported but phantom complete-discretion issue is barred at the threshold, but, even if it were not, it is far from an "important" let alone "compelling," matter of the kind specified in this Court's Rule 10.[5]

II. The Panel Power Question

The State's ungainly clutching for inclusion in its certiorari quiver at what its own hand buried below surfaces again as to whether vendor-SLA arbitrators have power to grant damages relief if found appropriate. The State is so intent on the disinterment as to be unembarrassed, evidently, by its failure to file a petition for rehearing to undo the asserted error of the Court of Appeals in attributing to it a concession of such power. There can be no doubt that the State affirmatively acknowledged such power in its own brief to dismiss the arbitration (App. 4) and that in none of its pleadings in the District Court was the Act itself, that is, aside

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[4] Given the State's failure to raise the point with due diligence, even the Court of Appeals' holding is not contrary to it.

[5] In urging denial of the petition, the federal respondents in their brief (pp. 7-8) point out that the State is not here in a position to raise the complete discretion question. Significantly, too, even amici curiae do not include that question among the ones said to be presented and shy throughout from joining hands with the State in that regard.

from the alleged bar of the Eleventh Amendment, invoked as prohibiting a damages award. Once more thwarting the State at the threshold, therefore, is the aforecited rule barring on review questions not duly raised or preserved below.

Substantively in any event, the petition, without succor from amici curiae, suffers from several shortcomings in urging this Court to resolve this question. Naturally for starters and without more, one is inclined to take with a sizeable grain of salt assertions so belatedly espoused at such odds with the State's stances below. It is hard to credit seriously a position the State would obviously have found advantageous to advance from the outset of and throughout the litigation had it in fact been thought reasonably tenable.

Not surprisingly, therefore, candid focus on the Act's purpose and its provisions for arbitration of vendor-SLA disputes quickly negates the remedial handcuffing conjured up by the State in myopic afterthought. Obviously, the basic purpose of the Act is to ease the economic plight of the blind by enhancing their opportunity to earn money through establishment of a valuable vending priority. (20 U.S.C. 107(b), App. 1, p. 1.) That monetary orientation, of course, necessarily configures as well the responsibilities of the SLAs undertaking to implement and administer the Act. Potentially and intimately at stake depending on faithful or derelict SLA function is the difference between realization or loss of vendor earnings or opportunity to earn. This is clearly so whether the particular SLA function focused upon is, for example, the issuance or revocation of a vendor's license, the installation or maintenance of adequate vending facility, the taking of action against a federal agency violating a vendor's priority, or the proper application of money collected from vendors as "set-aside" fees under the Act.[6]

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[6] In accord with the Act (20 U.S.C. 107b), the funds to meet much of the cost of the State's blind vending program (*e.g.*, purchase of equipment and fixtures, construction and maintenance of vending facilities, and benefits such as health insurance and pension plans), are derived from "set-aside" fees collected by the State from the vendors themselves and are held

Particularly against that telling backdrop, it is inevitable that much or most, if not all, of SLA conduct potentially open to dispute by vendors will concern money in some way, naturally including claims for money already lost in some situations. Thus, from the text of the Act, it clearly and manifestly follows that lost-money grievances were intended to be among those for whose resolution at a vendor's behest Congress mandated the arbitration and other procedure in 20 U.S.C. sections 107d-1(a) and 107d-2, having taken in section 107b(6) exquisite introductory care to exact from every SLA an express and specific observance commitment of contractual dimension. (App. 1 hereto.) After all, the only expression definitive of the kind of vendor-SLA dispute to be so resolved is the term "any," a term unmistakably of all-inclusive reach in common usage.

The State strays in precisely the opposite direction from the true mark in urging that the lack in the Act of express and specific authorization of damages as a remedy is fatal to the arbitral granting of relief in that form. That maladroitness is compounded by inapt reliance on *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), which is not a remedies but a liability decision. It involves an entirely different statute and the obviously different question of whether the word "person" served to bring the States of the union within the ambit of the prohibitory provision at issue there. In holding in the negative, this Court reasoned among other things (at p. 64) that "person" does not include "the sovereign" in common usage.

What the State misses is that the Act is silent not just as to damages as a remedy but as to any and all remedies appropriate in the context of vendor-SLA arbitrations, a fact tellingly signifying inclusion rather than exclusion of damages among the potential remedies intended. Obviously, instead of undertaking the onerous and even precarious task of attempting to forecast a remedial construct sufficiently and

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in trust for use for the limited purposes specified. (Calif. Welf. & Inst. C. § 19629.)

variantly responsive to the all-inclusive SLA violations made subject to the process, Congress sensibly empowered the fault-finding arbitrators in a particular case to resort to the remedies otherwise commonly available in the federal legal system in fashioning the relief determined to be most appropriate in light of the nature of violation and harm found. That approach was hardly iconoclastic; it is in accord with established general principles of longstanding applicability where a cause of action to sue in vindication of a federal right exists and Congress has been silent on the question of remedies. (*E.g., Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 69-71 (1992).) Thus, it is easy to understand why, in holding in favor of the Act's authorization of damages, the Courts of Appeals for the Sixth and Third Circuits included in their cogent reasoning (in addition to the clear thrust of the Act otherwise) the absence from the Act of anything ousting retroactive compensatory relief and attorneys' fees in spite of the well known use of such relief at the time in arbitrations generally. (*Tenn. Dept. of Human Serv. v. U.S. Dept. of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); *Delaware Dept. of Health v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1136, *et seq.* (3rd Cir. 1985).)

Predictably in the foregoing and clear light, the State's account of sharp circuit division on the question is errant and grossly overblown. To begin with, the Eleventh Circuit's aforediscussed decision in *Georgia, supra,* 915 F.2d 1482 did not overturn the damages award on the ground of a general lack of power to make such an award under the Act where appropriate but on the ground of no liability for any relief. In actuality, the court (at p. 1492) cited in passing and with seeming approval the Third Circuit's decision in *Delaware, supra,* applying the Act as authorizing damages.

The decisions holding in the affirmative on the authorization issue, that is, the one by the Court of Appeals here (Pet. App. A, pp. 8-9) and the ones by the Courts of Appeals for the Sixth and the Third Circuits in *Tennessee, supra,* and *Delaware, supra,* are each unanimous. In the three-way opinions in *McNabb v. U.S. Dept. of Educ.*, 862 F.2d 681 (8th Cir. 1988),

the dissent of Judge Lay (at pp. 684-685) joins the authorization group. Judge Fagg (at pp. 685-687) rejects authorization of damages of any kind. In an opinion appearing to be based more on the bar of the Eleventh Amendment than on the terms of the Act as such, Judge Doty compromises the issue, concluding, somehow, that the Act authorizes prospective but not retrospective damages (at pp. 687-688).

Thus, an accurate tally inclusive of the approving dictum in *Georgia* shows that, of the fifteen court of appeals judges in five Circuits who can be said to have addressed the issue squarely, no less than thirteen have recognized the Act's authorization of damages as a remedy, only one has declined to do so, and the other neuters the issue through conglomeration with the Eleventh Amendment.[7]

Nothing of merit to rescue the petition on the issue is added by amici curiae, who, in spite of the Court of Appeals' alert, have ignored that the State whose unfit coattails they clutch gave away the store below. To the scant extent they try legal analysis at all instead of "scare tactics," they parrot the State's mistakes, including the avowal of sharp circuit conflict. In the same indiscriminate way, they blend in a pinch of inapposite authority of their own. For example, undaunted by the obvious fact that the Act is the measure of vendor remedies against SLAs and does not refer to the APA for remedies but solely for review purposes, they drag in by the heels 5 U.S.C. § 702, which, of course, can touch at most the remedial exposure of such *federal* parties as come within the basic design of the APA.

The main theme of amici curiae is a transparently bogus one. The pretense is that, if allowed to stand, the decision of the Court of Appeals is so revolutionary that it will cause the States in general to reconsider and drop participation in the Randolph-Sheppard program and an array of other programs

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[7] That the reasoning of the overwhelming weight of court of appeals' decisions regarding the Act has been so cogent as to induce the federal respondents to depart from their erstwhile anti-power view noted by the State serves to belie rather than indicate a need for this Court to decide the issue.

under far-reaching enactments, all out of fear of the avalanche of greedy and bankrupting claims unleashed.

No twisting can hide that, aside from the State's fatal concession, the Court of Appeals' decision rests on nothing which has not been reported for years, including *Delaware*, decided more than a decade ago; that the Act is a special and unique creature, entirely unlike the other enactments alluded to; or that, in the more than ten years since *Delaware*, the incidence of successful damages claims against SLAs has been minuscule and will, in the last and just analysis, increase if at all due not to courts but to the dictates of the Act and proof of SLA abuses.

The explanation, we suspect, for the appearance of amici curiae is the hope that joinder in the State's outcry by eleven more of such important entities will impress the Court that the matter sought to be raised is also important and needful of attention. Far more impressive in that light, we submit, is that thirty-eight states have stayed away in spite of, no doubt, the present State's general campaign to recruit amici from among its sisters. (See, magazine excerpt reproduced and attached hereto as Appendix 8.)

In sum, the panel power issue is foreclosed at the threshold and is the subject at worst of a dwarfling conflict in the Circuits. The Court of Appeals' decision is in accord with the clear weight of Circuit authority which is in turn faithful to the clear intent of the Act. Wide recurrence of the issue is unlikely in view of the Act's inherently small reach and the historic dearth of litigation under it. Nothing is remotely at hand amounting to a "compelling" or even "important" reason for a grant required by Rule 10.

III. The Eleventh Amendment Question

There are multiple threshold obstacles to granting of the petition to resolve whether the Eleventh Amendment bars enforcement in a federal court of an arbitral award of damages found to be appropriate under the Act to redress SLA defaults. We welcome in that regard the demonstration by the federal respondents' brief (at pp. 8-9, 10, 12, *et seq.*) of some

of the considerations standing cogently in the way. Since the State was not duly diligent to raise or preserve any liability question now claimed, the case is not a suitable vehicle for resolution of a remedial issue. Also, it seems unavoidable that the point can be disposed of purely as a matter of statutory construction without ever reaching the Amendment because the Act authorized the damages award under a procedure potentially leading to federal court under the APA and to which every SLA has unmistakably been required to consent by the Act.

Yet another complication tending to undermine suitability of this case as a vehicle for the question is the one which the petition contrives to hide. As we have seen, the present arbitral award grants important injunctive relief of futuristic reach, not just compensation as to the past.[8]

Still more, and perhaps most telling of all, we think, the State is foreclosed at the threshold (that is, quite apart from the waiver exacted by the Act, discussed later) by its waiver of the Eleventh Amendment flowing from the circumstances surrounding its own selection of a federal court in which to commence this very action with the aim of invalidating the arbitration award. Important to recall is that the attacks on the arbitration included grounds for invalidation other than the unenforceability of the award under the Eleventh Amendment.[9]

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[8] The State's distortion of the relief granted is aimed, we think, at avoidance of the undermining complication not just factually, but legally as well to avoid the doctrine that the Eleventh Amendment does not bar injunctive relief against individuals who are State officials in charge and have been made parties.

[9] In addition to the claims of denial of due process in the arbitration noted above, which continued to be pressed throughout in the courts below, the State's initial pleading contained an attack illustrative of its reckless determination to "win" this case (manifesting itself in various ways). It even alleged the unconstitutionality of the Randolph-Sheppard Act in its entirety, the very foundation of the State's own blind vendor program and of like programs throughout the nation and the raison d'etre of financing

It is inescapable that, by its own choice of forum, the State opened the door to the potential exercise of federal jurisdiction over itself unhampered by the Amendment. After all, one potential outcome obvious from the start was that, if the court rejected all of the State's attacks on the award, a natural concomitant of such rejection (even in the absence of a counterclaim) would be for the court expressly to uphold and enforce an award which the Act made clear was to be final and "binding on the parties" unless overturned on APA review. (20 U.S.C. §§ 107d-1(a) and 107d-2(a).) Such a concomitant ruling in the event of the State's failure was especially foreseeable and virtually invited since, unless her counsel was asleep at the switch, Ms. Martin was almost certain to file a counterclaim for confirmation and enforcement lest her rights be otherwise lost by operation of the compulsory counterclaim rule (Fed.R.Civ.P. Rule 13(a), App. 2 hereto). Her claim not merely arose from the same transaction or occurrence as the State complained of but was the reverse side of the very coin the State had put into the judicial hopper. Significantly, there is decisional authority that a compulsory counterclaim need not be shown to have an independent basis otherwise for the court's jurisdiction over it and that a pleading seeking to invalidate an administrative award makes a counterpleading to uphold the award compulsory. (*E.g., Glen Falls Indemnity Co. v. United States*, 229 F.2d 370, 373-374 (9th Cir. 1955); *Burlington Northern, Inc. v. American Ry. Supervisors Ass'n*, 527 F.2d 216, 223 (5th Cir. 1975); *Matter of Arbitration Between Intercarbon Bermuda*, 146 F.R.D. 64 (S.D.N.Y. 1993).)

There is also a feature of the APA, referred to by the Act, which merits emphasis at this point. The APA makes it

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such programs to an overwhelming extent by federal "matching" funds together with "set-aside" fees collected from the blind vendors themselves under the Act. The wild attack on a wholesome enactment of sixty years' standing was expunged from the amended pleading in, no doubt, understandable though slow alarm at the folly of burning down the house to roast the pig.

expressly clear that "judicial enforcement" is included within "judicial review." (5 U.S.C. § 703.)

In such circumstances, it would, we submit, be unconscionable to leave the State free, at one and the same time, to chance invocation of federal court jurisdiction to the end of hoped-for self-advantage and yet to reserve the shield of the Eleventh Amendment in the event of failure and consequent and foreseeable confirmation and enforcement of the award in accordance with the compulsory counterclaim.

Once more in all events, the petition because of substantive deficiencies fails to show occasion for this Court to intercede on an Eleventh Amendment issue. Since those deficiencies essentially parallel the ones we have shown above to exist as to the panel power issue, brief recapitulation of what we have pointed out as to that issue should suffice now with a few additions.

All that is needed is candid focus on the text of this special and unique Act's network of pertinent provisions which, "clearly" and "manifestly" and at least by "overwhelming implication," require every SLA to consent to a waiver of the Amendment in order to qualify as a SLA. Such focus is eschewed by the State, which contents itself with empty rhetoric and self-proving conclusions as to what the Act does not do. It is poppycock that the decisions of the Court of Appeals here and of the one for the Third Circuit in *Delaware, supra,* rest solely on the provision for vendor-SLA arbitration and the fact that compensatory relief is awarded in arbitrations generally.

We recall from above: In view of the monetary orientation of the Act's very purpose and thus necessarily of SLA functions, it is inevitable that SLA conduct open to dispute by vendors will include those causing loss of money in some instances. It follows that such lost-money claims are among the disputes for whose resolution at a vendor's behest Congress has mandated a process inclusive of arbitration. The only definitive expression of the kind of disputes to be so resolved is the all-inclusive word "any." And Congress has taken introductory care in mandatory terms with use of the

word "agree" to exact from every SLA advance commitment to honor the resolution process.

We remind now as well that arbitral outcomes in the all-inclusive vendor-SLA process are unmistakably intended to be dispositive in view of their entrenchment as "final and binding on the parties" unless overturned on APA review. Without question, the potential to end up subject to the jurisdiction of federal courts is part of the all-inclusive process to which SLAs have consented. Under 5 U.S.C. § 703, the APA venue section, the proper court for review is "a court of competent jurisdiction," a phrase which, in light of the involvement of a federal underlying Act, must necessarily include, if not exclusively designate, federal courts.[10] And because, under the same APA section, the term "judicial review" expressly includes "judicial enforcement," and is clearly consistent with the intention that the arbitral outcomes be "final and binding on the parties," it is obvious that the process to which SLAs have consented may result not just in affirmance by a reviewing court but in enforcement by that court as well. Certainly, it is absurd to suppose that Congress envisioned two separate suits in two different courts concerning the same arbitration, one by the loser to have the award overturned and the other by the winner to enforce it.

On this question as well, the State cries out that the Act says nothing about damages as a remedy, ignoring that the Act is silent as to any remedy in vendor-SLA arbitrations, thus revealing potential inclusion of damages if appropriate among the intended remedies in conformity with the rule applied in cases such as *Franklin, supra.*

Such decisions of this Court as the State cites in a futile effort to manufacture a conflict with the Court of Appeals' decision involve enactments entirely different from the present one and lack anything remotely close to the network of

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[10] Significantly, at least two decisions that we know of treat the phrase under consideration as leading only to federal district court. (*Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336, 338 (1978); *Mass. Elected Committee of Blind Vendors v. Matava*, 482 F.Supp. 1186, 1189 (1980).)

dispositive provisions, except for *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), which held in favor of waiver of the Amendment under the "overwhelming implication" test.

In accord with *Delaware* and faithful to the dictates of the text of the Act, the Court of Appeals here held against the bar of the Amendment, correctly relying on the holding of and test applied in *Port Authority*. It is true that the Court of Appeals held to the contrary in *Tennessee, supra,* 979 F.2d at p. 1168, *et seq.*, even though it also first held that arbitration panels have power to award damages under the Act. It seems doubtful that, in view of intervening developments including the Court of Appeals' present decision, *Tennessee* on this point will be followed even in that Circuit or be of influence elsewhere. Its reasoning on the point is readily seen to be far from ideal. For one thing, it seems internally inconsistent since the power and the Amendment issues are both disposed of with clarity and force by features of the same dispute-resolution process. Also, at various points, the opinion appears to wander into adoption of the stricter test applicable to cases involving the question of Congressional abrogation of immunity under the Amendment.

Because of the threshold impediments involved, this in no event is a case suited for raising or resolving the Eleventh Amendment issue. Moreover, the Court of Appeals has correctly responded to the clear dictates of the Act, which the State does not try to explain away with reasoning or the citation of apposite authority. Under the Court's Rule 10, even circuit conflict on an "important" federal question does not control or fully measure the Court's discretion, and the two-to-one conflict involved here is far from "important" in these circumstances. In view of the inherently small reach of the Act, and as attested to by the paucity of presentation of the point in the nearly twenty-five years the vendor-SLA process has been in existence, the chances of recurrence soon are slim and, in terms of wide impact, none. By no analysis can the matter be viewed as amounting to "compelling reasons" as required for a grant by Rule 10.

IV. The Practical and Equitable Considerations Calling for Denial

Much counseling against a grant of the petition could be said in terms of considerations which sound in good sense, avoidance of undue hardship, the orderly and expeditious administration of justice under our system, and just plain fairness. However, there is not world enough and time at the moment, so we must find comfort in the thought that a good deal of the sorry picture should be discernable from what we have already said above, as well as from the decisions below, particularly the detailed rehearsal in the arbitrators' liability opinion.

Suffice it now to point out that Ms. Martin, a woman nearly sixty years old and of starkly limited means, has been struggling for eight years to obtain relief by proceedings specified in the Act from multi-faceted wrongdoing at the hands of those charged with the obligation to protect her. The wrongdoing brought about financial disaster, including the wrongful termination of the very license indispensable to her livelihood. Nevertheless, she has persevered and succeeded through eight years encompassing administrative hearings, the arbitration, the district court and the court of appeals. She shudders at the threat of greater delay on account of the present petition, particularly since the State was not duly diligent to raise and preserve any of the questions now sought to be advanced. Moreover, she has been and remains mystified as to why a question like the Eleventh Amendment can possibly excuse the failure of the State to implement for years the important injunctive relief ordered by the arbitrators, including restoration of her license.

At every inch of the way, the State has doggedly fought her even with stances reflecting a reckless no-holds-barred determination to "win" the case. At one point, there was even a transitional readiness to jettison the Act as unconstitutional in its entirety. At every stage below, it did not hesitate to vilify her as the cause of her own misfortunes through incompetence and irresponsibility as a vendor though knowing full well that the State's own evaluations were directly to the

contrary. Even now, the petition is contrived to hide the true nature of the wrongdoing found by the panel and the courts, as well as the true nature of the relief involved.

The one solacing feature of Ms. Martin's plight is that the arbitration and decisions of the courts below have vindicated her rights under the Act and serve, if not now disturbed, to relieve one of the objects of the Act's solicitude. If ever a time comes (which we think inherently doubtful for reasons already indicated) when this Court is inclined to intervene to resolve any of the questions sought unfitly to be raised, let it be, we earnestly pray, in a case where the decisions below have resolved the issues in a manner turning a beneficiary of the Act away without relief – let it be also in a case where the petitioner has been duly diligent below to raise and preserve the issues.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

JANICE A. JENKINS
B.V. YTURBIDE

Counsel for Respondent Jeana Martin

APPENDIX 1

[Selected Provisions of the Randolph-Sheppard Act]

20 U.S.C. § 107. Operation of vending facilities

"(a) Authorization. For the purpose of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

"(b) Preferences, regulations; justification for limitation on operation. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that –

"(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

"(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States. Any limitation on the placement

or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register."

20 U.S.C. § 107b. Application for designation as State Licensing Agency; cooperation with Secretary; furnishing initial stock

"A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make special application to the Secretary and agree –

"(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

"(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary . . .

"(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new

equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however,* That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

"(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

"(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

"(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title."

20 U.S.C. § 107d-1, Grievances of blind licensees, provides in relevant part:

> "(a) Hearing and Arbitration. Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. 107d-2, Arbitration, provides in relevant part:

> "(a) Notice and Hearing. Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for the purposes of chapter 7 of such title 5."

APPENDIX 2

Rule 13, Federal Rules of Civil Procedure

"(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot require jurisdiction. . . .

"(b) Permissive counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject of the opposing party's claim."

APPENDIX 3

DEPARTMENT OF REHABILITATION
830 K St., 2nd Floor
Sacramento, CA 95811

(916) 322-2070

October 6, 1989

Postmaster
U.S. Postal Service
3101 W. Sunflower
Santa Ana, CA 92799

Dear Sir:

The Department of Rehabilitation, Business Enterprise program would like your support in correcting an unacceptable violation of the Randolph-Sheppard Act at your facility. The blind vendor, Ms. Jeana Martin, has experienced more than a fifty percent loss of income due to unfair and direct competition which started when your private vending machine contract was renewed September 1, 1989. Prices were immediately reduced in the private machines thereby reducing the volume of sales in the blind vendor's machines.

Further, the vending machine income owed to Ms. Martin has not been paid by your organization for the period of October 1988 through September 1989.

The Department views the actions of your organization to be in violation of the letter and spirit of the Randolph-Sheppard Act (20 U.S.C. 107) and supporting federal regulations (34 CFR 395).

We hereby request a meeting with you to immediately resolve this problem. Time is of the essence and unless the matter can be quickly resolved, the Department of

Rehabilitation will be forced to pursue any and all remedial steps allowed by law.

Your prompt attention and response is most appreciated.

Sincerely,

HAO Q. LAM, Deputy Director
Program Management
& Support Division

HQL:11

cc: Don D. Edmon
Jeana Martin

APPENDIX 4

[Excerpt from State's brief supporting motion to dismiss arbitration]

* * *

[p. 14] **CONCLUSION**

Complainant has filed a Complaint which on its face is flawed. It is subject to the defense of absolute immunity. This panel has the jurisdiction to hear the issues raised by Ms. Martin, and to award her damages, yet if to does so, Ms. Martin has no means by which to enforce the award. Dismissal of the Complaint for Arbitration and Supplement is the only means by which to avoid the misuse of time and taxpayers' dollars. The State of California respectfully requests that this panel exercise its authority to dismiss the existing Complaint and Supplement, on the basis of the sovereign immunity of the State of California.

Dated: December 9, 1993

Respectfully submitted,

/s/ Gwynne Pratt Bacigaluppi
GWYNNE PRATT BACIGALUPPI
Acting Chief Counsel
Department of Rehabilitation

Attorney for Respondent
Department of Rehabilitation
State of California

APPENDIX 5

[Excerpt from State's opening memorandum supporting district court motion to disqualify the arbitration panel and to reverse and remand to new panel]

* * *

[p. 12] remodeling, she not only made an increased profit but also improved customer relations immediately.

However, the panel chose to ignore all evidence the plaintiff as respondent presented at the arbitration. The panel ignored the testimony of both Don Edmon and David Lyman and dismissed their testimony by stating incorrectly that the respondent's "denigration" of Complainant was unwarranted. (Exhibit B, page 29, 2nd paragraph) The panel accepted all Martin's letters over respondent's live testimony, the panel accepted uncorroborated, self-serving statements by complainant over all of the respondent's-department's witnesses. It was, therefore, inevitable that the panel would arrive at a decision on both liability and damages that was not only clearly erroneous but without "substantial evidence" to support it.

The panel ascribed "binding" precedential value to a 1981 San Francisco arbitration case taken out of context, never litigated beyond arbitration, and never given the force of law by any tribunal. (See page 29 of Exhibit B, first paragraph) Without authority and without any semblance of reason, the panel gave "great weight" to this unpublished, uncertified, and unrecognized arbitration decision. This was improper, illegal, and an abuse of discretion. An attorney who relies on unpublished opinions is sanctioned. The panel should be sanctioned.

In *Georgia Dept. of Human Resources* v. *Bell*, 528 F.Supp. 17, 24 (1981), the court clearly recognized that the state licensing agency (SLA) has *discretion* to file a complaint whenever a licensed blind vendor so requests. The Act imposes an [p. 13] obligation on the SLA to protect the vendor's "priority". The SLA must "pursue" a vendor's grievance when the vendor's rights are arguably being jeopardized by the Federal agency's actions.

Here, the panel discounted the efforts of Mr. Edmon to settle the dispute without the need for arbitration. The panel denigrated Mr. Edmon's efforts, substituting their Martinet-like judgment for a rational and measured approach. The panel improperly ignored the "discretion" that the court in *Georgia Dept. of Human Resources* v. *Bell* found. The fact is the plaintiff-respondent "pursued" Martin's grievance and protected Martin's rights as much as practical, as the evidence showed. The panel capriciously, unfairly, and without justification ignored the law and the plaintiff's evidence. The panel repeatedly abused its discretion.

Even the U.S. Department of Education itself, the panel's own empowering agency "encourages" both "parties involved to meet and discuss the issues, employing all reasonable efforts to reach an amicable settlement of the dispute." (See Exhibit A, third paragraph). The plaintiff-respondent adopted the same policy in dealing with the GMF but the panel, unrealistic in the extreme, capriciously found that insufficient.

The panel clearly found, in so many words, that though the work "priority" is used in the Act that the law should say "exclusivity", that no matter what Martin did

that she should be guaranteed a certain level of income, i.e., that the Act, rather than legislating a program of self-support, renumerative [sic] employment and the furtherance of economic opportunities for the blind, is, in fact, a thinly veiled welfare program for the

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APPENDIX 6

[Excerpt from State's district court reply to defendants' oppositions to State's disqualification/remand motion]

* * *

[p. 5] In *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482, 1488-1489, (11th Cir. 1990), the court held that the Randolph-Sheppard Act gives a State Licensing Agency (SLA) like the plaintiff herein, "*complete discretion* both to determine that a federal entity is not complying with the Act and to file a complaint in the case of noncompliance." (Emphasis added) The court found that 20 U.S.C. section 107d-1(b) mandates no procedures or substantive rules to govern either of the determinations mentioned supra. It was plainly the call of the plaintiff whether the General Mail Facility in Santa Ana was complying with the Act and whether to file a complaint for non-compliance against the GMF. It was, and is, therefore, error on the part of the arbitration panel to order compliance and error on the part of the defendants to assert that the panel was correct in ordering compliance.

The court in *Nash* (supra) applied an abuse of discretion burden on the *vendor* in both (1) showing that the state agency there abused its discretion in not determining that the federal facility was not in compliance and that, (2) even if the federal facility was not in compliance, that the state agency committed an abuse of discretion in not filing a complaint. (See *Nash*, supra, p. 1489-1490.)

The court concluded and ruled that the vendor may invoke the grievance procedures guaranteed under 20

U.S.C. section 107d-1(a), but "the vendor has *no substantive right to challenge* a state licensing agency's failure to bring a complaint pursuant to 20 U.S.C. section 107d-1(b)." (*Nash*, supra, p. 1495.)

[p. 6] Here, the plaintiff pursued Martin's grievances in the most expeditious manner possible to protect Martin's rights under Randolph-Sheppard and to effect a solution compatible with the Federal agency here involved. Though Martin is now dissatisfied with plaintiff's efforts, Martin has no substantive right to challenge this plaintiff's decision not to adopt the autocratic, non-business-like methods Martin and the panel would apparently prefer. Plaintiff under *Nash* has full discretion to resolve the matter in whatever way plaintiff sees fit. Martin alienated her customers at the Santa Ana Postal Facility (the General Mail Facility or GMF) and the GMF provided a contract for vending machine maintenance to another vendor. Plaintiff stepped in and did resolve the dispute by placing another vendor in the GMF (Patricia Evans) and giving Martin other facilities plus additional funding, plus support in the form of Joanne Gelfeld. The record is clear that plaintiff administered the Business Enterprise Program for Blind Vendors in a business-like manner.

Plaintiff exercised her business judgment and full discretion not to file and pursue a complaint against GMF but rather to place another vendor who successfully managed the facility at the GMF. Martin, though given another sizable facility at the Hall of Administration in

Los Angeles, could not correct her poor business practices. The panel ignored the evidence of plaintiff completely and, in so doing, blatantly denied plaintiff due process.

Plaintiff cannot now be denied her discretion under *Nash* and the Randolph-Sheppard Act, and both the defendant Martin and the Arbitration Panel are clearly in error in thinking they

* * *

APPENDIX 7

[Excerpt from State's district court reply to defendants' opposition to State's disqualification/remand motion]

* * *

[p. 8] court, so egregious was the denial of due process, so egregious the capriciousness of the panel's decisions.

The Federal defendants assert that the Fifth Amendment due process clause does not apply to states, such as plaintiff. (See Federal defendants moving papers-points and authorities p. 7, line 22 to p. 8 line 18.) However, it is inconceivable that plaintiff, whether a "state" or a "person" should be denied the rights and privileges connected with concepts of "due process" and "fundamental fairness" by an ad hoc arbitration panel appointed to seek the truth and resolve a dispute. Such a narrow interpretation is itself wholly inequitable and unjust. The Federal defendants are saying, in essence, that a pure legalism should be allowed to defeat the fair administration of the Act's arbitration process, a process into which plaintiff entered and in which plaintiff participated in good faith.

However, the provisions of the Administrative Procedure Act (APA) for review, set out by the Federal defendants on page 7 of their points and authorities speak directly to abuses of discretion, arbitrary and capricious decisions and decisions running counter to admitted evidence. Essentially, then, the standard to be applied by the court here should be one of fundamental fairness, i.e. due process. Couched in different terms, the standard of review to be applied by this court is one of due process to all parties by avoiding the antithesis of due process, arbitrariness and capriciousness. Therefore, whether

under the label "due process" or under a standard set out in the APA, and cited by the Federal defendants, the goal of fundamental fairness remains the same.

[p. 9] Plaintiff is, therefore, prepared to file a third amended complaint (Exhibit A) which changes Paragraph 20 of the Second Amended Complaint to one encompassing the standards set out in the APA. However, in the interests of judicial economy, plaintiff believes the issue of the panel's arbitrary decision should be litigated now using cited APA standards.

Further, the Federal defendants assert that the arbitration was not conducted in a capricious and arbitrary manner. Yet the standard of review the Federal defendants cite includes as factors to be considered in a review: ". . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency. . . . " (See Federal defendant points and authorities p. 7, lines 12-15).

The arbitration Panel failed to consider Martin's own conduct and business shortcomings in arriving at its decision. The panel failed to consider the financial reports submitted that showed that Martin made a profit despite her transgressions. They failed to consider Martin's ongoing pattern of negligence, her tax problems, and the clear difference a competent vendor (Patricia Evans) made when placed at the GMF. The evidence presented by plaintiff, as respondent, to the panel does run counter to the panel's decision and its cumulative effect clearly demonstrates that the panel's decisions were arbitrary and capricious.

For example, the panel and the defendants cite no specific legal duty imposed on the plaintiff by the Act or its regulations that plaintiff must collect, account for, be

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APPENDIX 8

[Excerpt from page 48 of "Year-End Legal Tidbits" by Charles S.P. Hodge, *The Braille Forum* (vol. XXXVI, No. 6), published by The American Council of the Blind]

"In September I reported that the Ninth Circuit Court of appeals had affirmed the federal trail court's ruling in favor of Jeana Martin, a former licensed blind vendor in the California program, and had ordered the state licensing agency to pay considerable monetary damages to Martin. The attorney general of California has nevertheless sought Supreme Court review, and the California state licensing agency through the National Council of State Agencies for the Blind has invited other state licensing agencies to file amicus curiae or friend of the court briefs with the court endorsing California's legal position in the case. . . . "